

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:09-cr-10243-MLW

4  
5  
6 UNITED STATES OF AMERICA

7  
8 vs.

9  
10 RYAN HARRIS

11  
12  
13 \*\*\*\*\*

14 For Jury Trial Before:  
15 Chief Judge Mark L. Wolf

16  
17 United States District Court  
18 District of Massachusetts (Boston.)  
19 One Courthouse Way  
20 Boston, Massachusetts 02210  
21 Wednesday, February 29, 2012

22 \*\*\*\*\*

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25 United States District Court  
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1 P R O C E E D I N G S

2 (Begins, 9:00 a.m.)

3 THE CLERK: Criminal matter 09-10243, the  
4 United States of America versus Ryan Harris. The Court  
5 is in session. You may be seated.

6 THE COURT: Good morning. Would counsel  
7 please identify themselves for the record.

8 MR. BOOKBINDER: Good morning, your Honor.  
9 Adam Bookbinder and Mona Sedky for the United States.

10 MR. MCGINTY: Your Honor, Charles McGinty and  
11 Christine Demaso for Mr. Ryan Harris, who is seated here  
12 at counsel table. Good morning, your Honor.

13 THE COURT: All right.

14 Since I saw you yesterday, I received the  
15 government's motion to reopen the evidence and included  
16 in it were cases intended to persuade me that the --  
17 define that the internet is inherently involved in  
18 interstate commerce for the purpose of the wire fraud  
19 statute. I just received a short time ago the  
20 defendant's motion for a supplementary instruction. I  
21 issued an order directing the government to provide a  
22 redacted version of the indictment that removes the  
23 allegations in Paragraphs 1 to 54 that related to the  
24 conspiracy as well as mail fraud. So I can consider  
25 further whether the revised form of the indictment, as a

1 matter of fairness, is the most appropriate one to go to  
2 the jury since the conspiracy charge has been dismissed  
3 on the defendant's Rule 29 motion, and the government  
4 has provided that redacted indictment.

5 Is there anything else I should have received and  
6 read?

7 MR. MCGINTY: No, your Honor.

8 MR. BOOKBINDER: No, your Honor.

9 THE COURT: All right. So I've got on my  
10 agenda, before we bring in the jury, the government's  
11 motion to reopen the evidence, the question of the  
12 redacted indictment, and then the jury instruction  
13 issues including the issue raised in the filing that I  
14 received about 30 minutes ago from the defendant.

15 Is there anything else that ought to be on that  
16 agenda?

17 MR. MCGINTY: I think not, your Honor.

18 MR. BOOKBINDER: No, your Honor.

19 THE COURT: Okay. Well, with regard to the  
20 government's motion to reopen, and I'm interested in  
21 hearing you on this, um, I've read all the cases that  
22 the government's cited and I'm not, at the moment,  
23 persuaded that as a matter of law I could find that the  
24 internet involves interstate wire communications. I  
25 think Judge Ponsor had it exactly right in *Phillips*.

1 The only thing I would add to his analysis is I don't  
2 think he referenced 18 United States Code, Section 10,  
3 which defines "interstate commerce." It says: "The  
4 term 'interstate commerce,' as used in this title,  
5 includes commerce between one state, territory,  
6 possession within the District of Columbia, and another  
7 state, territory, possession within the District of  
8 Columbia. The term 'foreign commerce,' as used in this  
9 title, includes commerce with a foreign country."

10 I believe it's a factual matter. Many of the  
11 cases cited by the government don't involve a wire fraud  
12 statute, they involve a child pornography statute, and  
13 some of the cases discuss that there's a difference  
14 between the jurisdictional requirement in some statutes  
15 that require using instrumentalities of interstate  
16 commerce and a requirement that something be itself in  
17 interstate commerce. Judge Ponsor discusses that in  
18 **Phillips**. I thought that the Eastern District of  
19 Pennsylvania decision in **Fumo**, which is a wire fraud  
20 case, conflated those two concepts. My present view is  
21 that communications from one state to another in  
22 furtherance of an alleged wire fraud scheme have to be  
23 proven as a matter of fact.

24 I'm inclined to allow the government to present  
25 additional evidence, essentially the evidence I would

1 have permitted yesterday before the government rested.  
2 The government didn't cite any First Circuit cases in  
3 its submission yesterday, but the First Circuit has  
4 helpful standards rooted in Rule 611(a). Those cases  
5 include **Peterson**, 233 F.3d 101 at 105, **Pandozzi**, 878  
6 F.2d 526 at 534, a decision written by then Judge  
7 Breyer, **Lindser**, 81 F.3d 1148 at 1160. In addition, the  
8 cases the government did cite, **Alderette**, 614 F.2d 726  
9 at 727, and **Marino**, 562 F.2d 941 at 944, are relevant.

10 The standards, as I understand them at the moment,  
11 are essentially as follows. Rule 611(a) gives the Court  
12 discretion to allow the opening. Fairness is the key  
13 criteria. It appears to me, at the moment, that failure  
14 to present certain evidence, like Exhibit 31, which the  
15 parties had stipulated was admissible, was inadvertent  
16 -- as I understand it the government forgot to offer it,  
17 and evidently the same with regard to the evidence of  
18 where the websites were hosted and where the wire  
19 transmissions, if there were wire transmissions, went to  
20 or came from.

21 To the extent the defendant had notice -- well, it  
22 doesn't seem to me at the moment the defendant would be  
23 unfairly prejudiced by the admission of evidence that  
24 would have been admissible yesterday before the  
25 government rested. I note that the defendant, in his

1 Rule 29 motion, didn't argue an absence of proof on  
2 interstate wire communications. That's an issue the  
3 Court raised. And I continue to think that there isn't  
4 any evidence.

5 I think yesterday the government said that  
6 Phillips had testified that GoDaddy hosted the site.  
7 That's not in our notes and it's not in the draft of the  
8 transcript on my computer. It's possible that it was  
9 overlooked by me, but I can't find it. And my clerks  
10 are directed to write down the answer to every question  
11 and they can't find it either.

12 As I understand it, the admissible testimony would  
13 not come as a surprise to the defendant. There's been  
14 discussion for months about who hosted the site.

15 I am somewhat concerned that a late-filed motion  
16 in limine by the government, that we discussed on  
17 February 17th, contributed to the government's error,  
18 and that went to the question whether there would be a  
19 reference to Russia as the original host of the site and  
20 the government hadn't, um, had a chance to respond to it  
21 and so I said, "Don't mention Russia unless and until  
22 you come back to me," um, so I can decide. I wasn't  
23 focusing on, you know -- evidently the government wasn't  
24 focusing on the requirement to prove the transmission in  
25 interstate or foreign commerce because that's a



1 jurisdictional element and I didn't understand I was  
2 excluding the evidence of the -- of where the site was  
3 hosted, just the fact that it was Russia as opposed to  
4 some other place outside of Massachusetts. If we had  
5 focused on this, I might have, on reflection, I probably  
6 would have let the evidence concerning Russia in in the  
7 absence of the stipulation that the website was hosted  
8 someplace other than in Massachusetts.

9 As I understand it, the evidence will not much  
10 delay the progress of the trial.

11 The proposal, as I understand it, that Agent  
12 Russell introduced Exhibit 31, a PayPal receipt showing  
13 that TCNISO had a GoDaddy site in 2008, and it's  
14 represented that Russell has personal experience that  
15 would permit him to testify that GoDaddy's site is  
16 located in Arizona. I might permit some brief voir dire  
17 on that to see if he does have sufficient personal  
18 knowledge to testify.

19 The second proposal, as I understand it, is that  
20 he testify, quote: "Given the setup of the internet  
21 access of the internet website by an individual in  
22 Massachusetts necessarily involves interstate  
23 communications because the access must go through one of  
24 six national hubs, none of which is located in  
25 Massachusetts." Well, that may be expert testimony and

1 Russell wasn't designated as an expert. I don't know  
2 that the defendant is in a position to deal with that.

3 Just hold on just a second.

4 MR. BOOKBINDER: Okay. Sure.

5 THE COURT: And I don't know if Mr. Russell  
6 has any possible testimony based on admissible  
7 information that the website, before being in Arizona,  
8 was in Russia or in a foreign country, because, as I  
9 recall, the -- it was represented to me that the website  
10 was transferred to Arizona from Russia in 2007, maybe,  
11 and some of the charges in the indictment precede 2007.

12 So as to the problem, I want -- you know, this is  
13 a trial, not a game, so it should be fair to both sides,  
14 the public, which the government represents, and the  
15 defendant. Well, that's my present tentative state of  
16 mind on that.

17 MR. BOOKBINDER: Now, your Honor, a couple of  
18 things. First, Special Agent Russell was designated as  
19 an expert. We told the defense that --

20 THE COURT: Hold on a second.

21 (Pause.)

22 THE COURT: Okay. Good.

23 MR. BOOKBINDER: In the form of, um,  
24 essentially summaries in our discovery letters, we told  
25 the defense that he would be describing, testifying

1 generally about, um -- and I don't have the language  
2 right in front of me, but essentially about operations  
3 of internet websites, communications over the internet,  
4 we gave them his background that would qualify him to be  
5 an expert.

6 THE COURT: Do I have that in the *Jencks*?

7 MR. BOOKBINDER: Your Honor, I apologize, that  
8 was probably in one of our many discovery letters --  
9 yeah, I know it was in one of our discovery letters, and  
10 I don't know that that is one that --

11 THE COURT: But as a practical matter, is that  
12 right, Mr. McGinty?

13 MR. MCGINTY: I remember -- your Honor, I  
14 remember a disclosure that the government gave about the  
15 scope of the expert testimony. I don't recall  
16 specifically, but I can trust --

17 THE COURT: Well, who has it? I'm sorry.

18 Do you object to him giving that evidence, that  
19 testimony?

20 MR. MCGINTY: I'm sorry?

21 THE COURT: Well, let Mr. Bookbinder go ahead.

22 MR. BOOKBINDER: So, um, that's --

23 THE COURT: And, actually, Mr. McGinty, why  
24 don't you listen to this and then I'll give you a chance  
25 to look for what you need to look for.

1 MR. MCGINTY: Thank you.

2 MR. BOOKBINDER: So he was designated and I  
3 would suggest that his testimony is within the scope  
4 certainly of his experience.

5 And the other thing to keep in mind is that while  
6 I understand the basis for the Court's decision not to  
7 take judicial notice or instruct as a matter of law that  
8 this is an interstate transmission, it goes to -- but  
9 the fact that several cases have at least suggested  
10 that's the case goes to sort of the expert nature of the  
11 testimony. This is pretty close to common knowledge to  
12 the extent that --

13 THE COURT: What case does that? Almost all  
14 the cases I read last night the government called an  
15 expert.

16 MR. BOOKBINDER: Well, your Honor, I suggest  
17 that to the extent that the courts are saying that as a  
18 matter of law --

19 THE COURT: They're not saying it as a matter  
20 of law. And I read those cases. They're dealing with  
21 it as a matter of fact. And the Department of Justice  
22 brings an expert. The Department of Justice brings an  
23 expert.

24 MR. BOOKBINDER: Right.

25 THE COURT: Well, let me just say this, um,

1 because it will make me feel better. You know, we've  
2 been working so hard to get this case done and you've  
3 been doing a very good job, you know. The Department of  
4 Justice, according to the media, recently lost a highly-  
5 publicized mail fraud case, the disabled pension fraud  
6 case of the bodybuilder firefighter, because it offered  
7 inadequate evidence. The jurors said that mailings were  
8 foreseeable. You know, this is a jurisdictional element  
9 of the offense, but it's been a prominent issue here.  
10 And, you know, we've got the experts from the Department  
11 of Justice Cyber Crimes Section, and I'm reading the  
12 cases you cited, and in almost all of those cases there  
13 were experts who testified on the operation of the  
14 internet.

15 So I guess I'm just surprised and disappointed  
16 that I've got the jury sitting back there while we're  
17 having this discussion.

18 MR. BOOKBINDER: And you're right, your Honor,  
19 it's a mistake. It's a mistake on our part. It was --  
20 you know, we've been discussing so many different things  
21 that we lost sight of this particular aspect, and  
22 there's no question that -- and the case law is --

23 THE COURT: Well, let me ask you a question.  
24 I've seen Mr. Hyman come into the courtroom for part of  
25 this. Is he the supervisor?

1 MR. BOOKBINDER: Yes, he's my supervisor in  
2 this case.

3 THE COURT: Right.

4 MR. BOOKBINDER: Yeah, and, as I said, there's  
5 no question this was a mistake and I take responsibility  
6 for that. It was certainly an oversight. And, um, I'd  
7 suggest that there certainly wasn't any -- in all this  
8 discussion about Russia and about Arizona, that there's  
9 no -- there's no actual factual issue, um, and there's  
10 certainly no question of surprise to the defense.

11 THE COURT: Well, that -- you know, you  
12 understand me exactly and I really -- I'll see if  
13 Mr. McGinty says the same thing. I do need to protect  
14 against unfair surprise. And on the other hand, as I  
15 said, you know, this is not a game, it's not going to  
16 take too long, and this is testimony that would have  
17 been admitted yesterday before you rested. So I'm  
18 inclined to admit it.

19 MR. BOOKBINDER: Certainly as to Russia, your  
20 Honor, we should have and we did not articulate for the  
21 Court that basis for admitting it, and again that was a  
22 mistake, but this was evidence that we had hoped and  
23 intended to offer, but Mr. McGinty had objected to it  
24 and was able to get it excluded.

25 THE COURT: But I actually didn't -- I mean

1 I've looked quickly, since I've had the jury  
2 instructions and other things, at the draft of the  
3 transcript. The problem was naming Russia and we didn't  
4 discuss the jurisdictional implications of that at all  
5 and I think the transcript will reflect that where it  
6 was left was, I said with regard to Russia: "The  
7 government shouldn't offer the evidence until you  
8 respond," till the government responds to the motion in  
9 limine that I think had been filed the day or the night  
10 before the hearing on February 17th, "and I rule on  
11 it." And you said, "We'll either respond and explain  
12 our basis and provide some legal support. If we decide  
13 on balance it's not necessary, then we understand the  
14 Court to be saying we can't offer it unless we persuade  
15 you we can." And I can tell you, if you pointed out to  
16 me that it's a jurisdictional element in some of the  
17 counts, you would have persuaded me that the absence of  
18 a stipulation be put in evidence that it was hosted in a  
19 foreign country, probably in Russia. But anyway. There  
20 we are.

21 MR. BOOKBINDER: Yes, your Honor.

22 THE COURT: And if somebody can find a --  
23 well, let me hear from Mr. McGinty. You know what my  
24 inclination is.

25 MR. MCGINTY: I do.

1           Your Honor, I looked at the discovery letters and  
2       there are a number of instances where there is a  
3       description of the anticipated testimony of Agent  
4       Russell. I can't find one that addresses testimony on  
5       this aspect. And I have -- I think I have all the  
6       discovery letters here.

7           If we sort of go back to the conversation  
8       yesterday, the government's response was not, um, "We  
9       neglected to ask the witnesses," the response was "We  
10      think we satisfied the element." So the decision to  
11      bring in the evidence was a deliberate decision.

12          Now, the Court is being asked now to provide an  
13      opportunity that rests on a claim of inadvertence. If  
14      someone -- if a party makes a tactical decision and the  
15      tactical decision is to put something in, not to put it  
16      in, to advances a claim, not advance a claim, then they  
17      do that -- that there are consequences from that. And I  
18      think it's plain that the government was of the view  
19      that it had satisfied that element.

20          Now, having the benefit of the Court's take on  
21      this, um, the government's view is, "Well, we could get  
22      some evidence in to satisfy the Court's legal structure  
23      of analysis." I don't know that that --

24                THE COURT: I think you used exactly the right  
25      word, if I thought or think, and maybe I didn't hear



1 anything that, you know, the government was being asked  
2 to be relieved of the consequences of a tactical  
3 decision. You know, they had some witness that they  
4 decided not to call because they thought he was doing  
5 more harm than good. Um, I think I would say they're  
6 stuck with that.

7 This, you know, if there was a misunderstanding as  
8 to what they need to prove -- oh, I don't know, if the  
9 Cyber Crimes Division of the Department of Justice  
10 thinks you don't need expert testimony, I don't know why  
11 you've given it to every judge except me, or to every  
12 jury except mine. I don't see it at the moment, but  
13 I'll listen to --

14 I don't know. Was it a tactical decision?

15 MS. SEDKY: I'll take responsibility because I  
16 answered the question. No, it was not tactical, it was  
17 a complete embarrassing oversight on my part and I was  
18 caught completely off guard and the first thing I could  
19 think of -- it's so axiomatic to me -- I apologize.  
20 This is really a problem for me. I am so seeped in the  
21 internet in my job and my life, this is so axiomatic to  
22 me. I overlooked it. And when you asked, I -- this is  
23 what I grabbed for. It was not a tactical decision, it  
24 was an omission on my part. And I called my section, as  
25 soon as we were done, and I told my boss that I forgot.

1 And, um, I'm embarrassed and, um, it was not tactical.

2 THE COURT: Now I see that Mr. Hyman has come  
3 into the courtroom.

4 Mr. Bookbinder told me you were supervising him on  
5 this and what I've said -- you know, I'm forced to  
6 reiterate, because I'm going to decide this, you know,  
7 but some of this -- some of these issues recur and I  
8 have discretion.

9 You know, there was a highly-publicized mail fraud  
10 case in this district just months ago, um, a bodybuilder  
11 disability pension from the fire department who was  
12 charged with mail fraud and when the government lost the  
13 case the interview showed the juror said to the  
14 reporter: "We found that there was inadequate evidence  
15 to prove that he foresaw the mails would be used." So  
16 it's prominent in this district that the jurisdictional  
17 requirements can be decisive. And I would think that  
18 it's particularly surprising that the jury's sitting  
19 back there while we're having this conversation.

20 But, as I said, this is not a game, I have the  
21 discretion to do what's fair and -- if you want to be  
22 heard a little further, Mr. McGinty, on anything other  
23 than the sort of expert part of the testimony, um, I'm  
24 going to be open to the testimony. But what I wanted to  
25 do is get us back to where -- because I'm satisfied this

1       wasn't a tactical decision, it was a -- it was a  
2       mistake, and it's a mistake that I caught, as I said, it  
3       wasn't a Rule 29 issue.

4               But is it your contention, Mr. McGinty, that you  
5       would be -- that Mr. Harris would be unfairly prejudiced  
6       if in addition to talking about, um, Exhibit 31 and  
7       Arizona, that Agent Russell talked about the operation  
8       of the internet?

9               MR. MCGINTY: I do think that. I don't know  
10      that we got a disclosure. I don't want to make a  
11      definitive statement, but it appears as if we did not  
12      get a disclosure.

13              THE COURT: Do you have all of the letters  
14      there?

15              MR. MCGINTY: I have all of the letters here  
16      except for -- I have the letters up to February 3rd, but  
17      there were several letters after that, but they were in  
18      the nature of, you know, "We just got the report last  
19      night," like that, as opposed to during the course of  
20      discovery.

21              THE COURT: So you have the letters that  
22      relate to Mr. Russell?

23              MR. MCGINTY: I do.

24              THE COURT: Why don't you show them to the  
25      government and if you want I'll take them.

1           You don't have a copy of them here,  
2           Mr. Bookbinder?

3                   MR. BOOKBINDER: No, I don't have them right  
4           in front of me, your Honor.

5                   (Pause.)

6                   MR. BOOKBINDER: Your Honor, I think  
7           Mr. McGinty is correct, although I don't have all the  
8           letters. Now, I don't think in the sense that we did  
9           disclose Mr. Russell as an expert and his expertise in  
10          the areas of the internet and that he would talk about  
11          internet communications, but we did not talk -- we did  
12          not -- and the kinds of language and things like that  
13          that were used. But I don't believe that we said that  
14          his testimony would include, um, specifically the  
15          discussion of the architecture of the internet.

16                  THE COURT: Well, I'm interested in -- may I  
17          see the letter? I want to do this as a matter of  
18          fairness. But if you look at your trial brief, you  
19          identified two experts, Kohler and Brodfuehrer, and then  
20          I asked you about this on February 7th and I said: "The  
21          government mentioned in its trial brief that it proposed  
22          to elicit expert testimony from two witnesses, Kohler  
23          and Brodfuehrer, is that right?" Mr. Bookbinder said,  
24          "It is, your Honor." And I asked, "Have you made expert  
25          disclosures by February 16th, I don't know if there was

1 a deadline?" And you said, "I don't know that you gave  
2 us a deadline, but we did make the disclosures." And  
3 then I asked the defendant if he was going to provide  
4 any expert testimony, or offer any? and he said, "Not at  
5 this time." And then I said, "Since the government has  
6 disclosed its expert evidence, Rule 16 required the  
7 defendant to do the same," and so I gave him until  
8 February 14th, the defendant, to do that.

9 MR. BOOKBINDER: Again, your Honor, I don't  
10 think there's a dispute that we -- and you're right, we  
11 did not identify him for the Court, we did disclose him  
12 for the -- we didn't tell the defendant --

13 THE COURT: The important issue is not whether  
14 I knew, it's whether the defendant had notice and an  
15 opportunity to prepare.

16 Can somebody show me the relevant letter?

17 (Pause.)

18 MR. BOOKBINDER: Your Honor, there are three  
19 of them here, they're discovery letters 10, 12 and 13.  
20 I believe there's another one that we don't have handy  
21 where we just provide his background. But those are, I  
22 think, the ones that discuss the nature of his  
23 testimony.

24 (Pause.)

25 THE COURT: This doesn't seem -- the earliest

1     dated -- well, February 3rd says: "There's one  
2     additional piece of testimony we expect to elicit from  
3     Special Agent Russell that may be -- that might be  
4     considered expert testimony, that there are many ways  
5     to, without paying, be anonymous on the internet.  
6     Russell will give several examples which will include  
7     commercial anonymizing websites, which is  
8     anonymizer.com, et cetera.

9             But is there anything -- and that's discovery  
10     letter 13 and I also have 10 and 12.

11            I mean, is there anything else which the  
12     government said -- you know, talked about his expertise  
13     with regard to the internet? Are these the only three  
14     letters you think where he's discussed?

15            MR. BOOKBINDER: Your Honor, I think there is  
16     another one -- and again I apologize, I don't have it  
17     handy, but we certainly disclose that he's going to  
18     describe -- talk about technical jargon, about the  
19     internet as it relates to the posts and the chats, which  
20     is again based on his expertise.

21            What I guess I would suggest, your Honor, is that  
22     given -- I understand the issue here is one of prejudice  
23     to the defendant and one of fairness. Um, given the  
24     nature of the information he'd be testifying about, as  
25     described in the case law, that internet communications

1 inherently are interstate, I would suggest that even  
2 with notice there's not -- that this is not a principle  
3 that the defense could realistically challenge. So even  
4 with -- I understand the requirements, the Court's  
5 requirements, um, and there's no question about the fact  
6 that we did not, or I don't believe we disclosed this  
7 particular testimony, but I would suggest that any  
8 violation, inadvertent as it was, of the Court's order,  
9 um, would not prejudice the defendant if the Court were  
10 to allow this testimony now.

11 THE COURT: Do you think Mr. Russell has any  
12 admissible testimony with regard to Russia, you know,  
13 the website being hosted in Russia? Because some of  
14 these transmissions --

15 MR. BOOKBINDER: Could I just have a minute to  
16 ask him?

17 THE COURT: Yes.

18 (Pause.)

19 MR. BOOKBINDER: Your Honor, I'd suggest that  
20 the admissible evidence about Russia are the things that  
21 we talked about earlier and that the Court excluded  
22 because we didn't raise this issue.

23 THE COURT: No, but --

24 MR. BOOKBINDER: No, Mr. Russell does not have  
25 any --

1           THE COURT: But I think it's your contention  
2           that if Mr. Russell's permitted to testify about how the  
3           internet operates generally, as you represented  
4           yesterday, that would be sufficient to prove interstate  
5           or foreign commerce without having to identify Russia as  
6           the place that hosted one of the sites.

7           MR. BOOKBINDER: It absolutely would. There  
8           is also, your Honor, the statements of Harris that we  
9           talked about weeks ago in the chats where he's talking  
10          about being hosted in Russia and the advantages of  
11          that. And so his own statements would be admissible if  
12          they weren't excluded for other reasons.

13          THE COURT: Well, I didn't -- just to be  
14          clear, I told you not to talk about them until you  
15          responded to the motion in limine and I could rule on it  
16          and you didn't respond.

17          MR. BOOKBINDER: Oh, your Honor, this mistake  
18          is on us. There's no question.

19          THE COURT: I'm going to say this one more  
20          time to be cathartic and then we're going to do a voir  
21          dire of Mr. Russell. And it's very unfortunate the  
22          jurors are sitting back there. But I want to see what  
23          he's got to say and, you know, whether the defendant is  
24          able to deal with it.

25          MR. MCGINTY: Your Honor, there's two prongs



1 here. Um, the second prong is the expert prong. I  
2 didn't prepare for an examination that related to one of  
3 six national hubs that internationally --

4 THE COURT: No, I want to see what he's got to  
5 say and that's what I'm pointing out. And it's -- we'll  
6 see what he's got to say. You'll get a chance to  
7 challenge it. And I might grant a continuance if I  
8 think it's in the interest of justice. But just for one  
9 final catharsis for me, because it's very dis-serving  
10 that the jury is sitting back there waiting, that I find  
11 it astonishing particularly after the highly-publicized  
12 media report that a prominent mail fraud case against a  
13 firefighter was -- didn't result in a conviction because  
14 the jury did not find adequate evidence to prove that  
15 mailings were foreseeable, that the government, the  
16 prosecutor from Massachusetts and somebody from the  
17 Cyber Crimes Unit of the Department of Justice would  
18 forget to put in evidence of the interstate wire  
19 communications that's essentially in each count for each  
20 element of Counts 2 through 9. So now I've got that off  
21 my chest again.

22 Call Agent Russell and let's see what you want to  
23 ask him to present to the jury.

24 MR. BOOKBINDER: Your Honor, the United States  
25 calls Special Agent Russell.

1 (Voir dire testimony.)

2 DIRECT EXAMINATION BY MR. BOOKBINDER:

3 Q. Special Agent Russell, when you testified yesterday,  
4 I guess it was, you testified about your background and  
5 your familiarity with internet communications and  
6 internet uses, correct?

7 A. That's correct.

8 Q. And are you familiar -- is part of that background,  
9 and given your experience, with how traffic moves when  
10 someone accesses the internet?

11 A. Yes, I am.

12 Q. All right. Now, in a typical example, if someone is  
13 sitting at their computer in Massachusetts and they type  
14 in "www.google.com" or "amazon.com," does -- and that  
15 website comes to their computer, does that, um -- does  
16 that internet traffic have to go, their transmission  
17 have to go through some kind of centralized server?

18 A. Well, the internet itself is not centralized, it's  
19 decentralized, um, but communications from a user is  
20 basically broken down into two distinct steps. The  
21 first step is the request. Once you type "www.dot"  
22 whatever into your browser, the request is sent out, um,  
23 which ultimately reaches the internet, um, requesting  
24 the location, um, the numerical location of that  
25 address. The "www" is typed in there which helps people

1 to remember it's a website, but the computer  
2 transmission will actually occur with numerical  
3 numbers. So a request is sent out requesting the  
4 location of -- a numerical location of that website.

5 That request first goes through the user's ISP and  
6 from the user's ISP it makes it way up to what are known  
7 as "internet route servers" and there are a number of  
8 these internet route servers that respond to these  
9 requests worldwide. It then sends the location, the  
10 numerical location of that website back to, um -- down  
11 through the internet, which is ultimately seen by the  
12 ISP, which then is sent back to the user. Once that  
13 location is received, um, then the website -- the user's  
14 data basically via random route is connected to that  
15 website and that communication to and from that website  
16 commences.

17 Q. You mentioned, I think you called them, "route  
18 servers," is that correct?

19 A. That's correct.

20 Q. Are any of those route servers, that the internet  
21 uses, in Massachusetts?

22 A. I'm sorry. Could you repeat that?

23 Q. Are any of those route servers in Massachusetts?

24 A. As far as my knowledge, no.

25 THE COURT: Well, do you know where all the

1 route servers are?

2 THE WITNESS: Basically there are 13 companies  
3 that control the route servers. The route servers are  
4 distributed throughout the world. I know there's one in  
5 New York. There's one in Washington D.C. There's one  
6 in California. There's one in Seattle. I don't know if  
7 they're all in -- well, a number of them are overseas as  
8 well.

9 Q. Are you aware of any other route servers -- well,  
10 you mentioned those that are in the United States and,  
11 again, you're not aware of any others in Massachusetts,  
12 correct?

13 A. Um, no, when we're talking about route servers,  
14 there are none in Massachusetts, but there are data  
15 centers located in almost every major state. There's a  
16 data center that's located in Massachusetts and a data  
17 center helps facilitate the transmission of internet  
18 traffic over the internet. But data centers are not  
19 route servers. They have different functions.

20 Q. And as you said, if someone types in a website, a  
21 portion of that communication has to go through one of  
22 these route servers, correct?

23 A. That is correct.

24 MR. BOOKBINDER: That would be essentially the  
25 testimony --

1 A. Well, actually, can I make a correction?

2 Q. Sure.

3 A. The data doesn't actually go through the route  
4 servers, it just communicates with the route servers.

5 MR. BOOKBINDER: Thank you.

6 THE COURT: Does it go through something?

7 THE WITNESS: I think it goes through a number  
8 of computers, it goes through routers basically that are  
9 hosted by major ISPs.

10 THE COURT: At major ISPs?

11 THE WITNESS: That's correct. They're called  
12 "hearing stations."

13 MR. BOOKBINDER: Maybe I could clarify that.

14 Q. When it communicates with the route server, it's  
15 sending an electronic signal or a wire to that server  
16 and receiving one back?

17 A. Um, indirectly, yes.

18 Q. Okay. So therefore if it's sending a signal to a  
19 server that's outside Massachusetts, there's some kind  
20 of electronic communication outside of Massachusetts,  
21 correct?

22 A. If you could -- I'm sorry.

23 THE COURT: Put the question again.

24 A. I'm sorry.

25 Q. So what you're saying is there is some kind of an

1 electronic communication with one of these route servers  
2 that is outside of Massachusetts, is that correct?

3 A. Um, with a typical communication, yes.

4 MR. BOOKBINDER: That would be the testimony,  
5 your Honor.

6 THE COURT: Well, I wanted you to elicit all  
7 the testimony.

8 But here, hold on just one second.

9 (Pause.)

10 THE COURT: I'm actually sorry to break this  
11 up, but, I mean, maybe there's a reason that the  
12 defendant didn't raise the lack of evidence on this and  
13 I did yesterday.

14 I'm reading the defendant's motion in limine  
15 regarding the Russian web host that was filed on  
16 February 16th and we had the hearing on February 17th,  
17 and the government didn't have a chance to respond to  
18 it, as I said. And it says: "Defendant Ryan Harris  
19 moves to exclude any testimony or evidence regarding the  
20 fact that the TCNISO website was at some time hosted by  
21 a company in Russia. The evidence is unduly prejudicial  
22 without being probative of any disputed issues and it  
23 would only serve to distract and confuse the jury." And  
24 then at the beginning of the third paragraph: "The  
25 uncontested fact that Harris moved the website from

1 Russia to the United States negates any relevance to  
2 evidence regarding the Russian host -- any evidence the  
3 Russian host might have in terms of consciousness of  
4 guilt." The defendant, before trial, characterized this  
5 as "undisputed," but it didn't turn out to be stipulated  
6 to.

7 But I -- on this particular issue, maybe I ought  
8 to, rather than have expert testimony on this, which  
9 having read the cases I read last night, I have  
10 questions about, that maybe I should just deny this  
11 motion in limine and we'll see if there's some evidence  
12 that's not unduly prejudicial, but not for consciousness  
13 of guilt. I'll tell them there's nothing wrong with  
14 using a website outside of the United States. Maybe  
15 some of those chats or statements by Mr. Harris should  
16 go in.

17 MR. MCGINTY: Well, you know, the government  
18 was of the view -- and I think this was apparent  
19 yesterday when the government responded to your  
20 question, but the government was of the view that it has  
21 sufficiently shown this element. The Court is now  
22 addressing what could be done about that in terms of  
23 whether the government would be permitted, um, to reopen  
24 the evidence. The Court is now saying that the defense  
25 should face a choice and the choice is that it imperils

1 its case, um, if it dare go down this road.

2 THE COURT: I'm sorry. Dare go down what  
3 road?

4 MR. MCGINTY: Down the road of taking the  
5 Court's invitation that the government might put in the  
6 Russia element. The Russia element was the subject of a  
7 motion in limine because of the association between  
8 Russia and a possible adverse inference, it was not  
9 intended to obviate the government's burden of proof.  
10 And the idea, um, that the back door should be open on  
11 the Russia element of this, um, has somehow alleviated  
12 the government's responsibility to address an element  
13 that is fairly, you know, conspicuous.

14 THE COURT: We're all having to react to this  
15 quickly necessarily, but one of the things I'm reminded  
16 on is that your motion in limine, which I never really  
17 ruled on, I just said it raised questions, that I was  
18 concerned about it, that the government would have to  
19 respond and I'd have to rule before they could mention  
20 Russia, um, you know, here you say -- twice here on the  
21 first page, and on the second page, that it's -- you  
22 know, that Russia was not probative of any disputed  
23 issue and it was an uncontested fact that Harris moved  
24 the website from Russia to the United States.

25 You know, the jury could be told, but it would



1 have to be through admissible evidence or a stipulation,  
2 you know, that the website was hosted outside -- you  
3 know, it was, at all times relevant to this case, hosted  
4 outside of Massachusetts, you know, a stipulation to  
5 that fact, and you don't have to, and there wouldn't  
6 need to be any evidence on it, otherwise there would  
7 need to be some admissible evidence on it, and  
8 Mr. Ryan's own statement, Mr. Harris's own statements,  
9 are admissible. So if you find some of those discrete  
10 pieces of evidence, I could consider letting that in.

11 As I said, I really don't want to strike -- I  
12 don't want Mr. Harris to be worse off than he would have  
13 been, you know, if we were having this discussion  
14 yesterday before the government rested. On the other  
15 hand, um, if I am persuaded that we're in this position  
16 not because of some tactical decision by the government  
17 that's gone wrong, but by virtue of a surprising  
18 oversight, um, I'm still inclined to exercise my  
19 discretion to let in evidence that I would have let in  
20 yesterday, if it's not too time-consuming. I am  
21 concerned about this proffered expert evidence in terms  
22 of notice to the defendant and also its reliability, if  
23 what this witness would say sounds any different than  
24 some of what I read in the cases that you gave me last  
25 night.

1           So why don't you --

2                   MR. MCGINTY: I'm sorry. May I just have one  
3 moment?

4                   THE COURT: Yes.

5                   (Pause.)

6                   MR. MCGINTY: I just want to understand what  
7 the Court's thinking is at the moment.

8                   The government is offering two different types of  
9 evidence. One, um, experience -- that the agent knows  
10 from personal experience that GoDaddy is located in  
11 Arizona.

12                   THE COURT: Yeah, which I expected him to ask,  
13 if he has admissible -- I think you want to get in  
14 Exhibit 31, it's the GoDaddy receipt.

15                   MR. BOOKBINDER: Yes, your Honor, I'm happy to  
16 ask him that as well. I thought we were focused on the  
17 expert --

18                   THE COURT: Well, we'll do that.

19                   But I do want you to clearly understand what my  
20 fluid thinking is. I necessarily, you know, have to  
21 take the general principles that were from the cases I  
22 cited that have fairness as a touchstone and try to  
23 figure out what the right balance is. And I'll tell you  
24 what my thinking is. I want to give you a chance to  
25 have a voir dire to see whether he has personal

1 knowledge that would permit him to testify that GoDaddy  
2 is in Arizona -- that the GoDaddy site is hosted in  
3 Arizona.

4 I'm considering whether, at this point, I'm not  
5 inclined to allow him to give expert testimony which  
6 wasn't disclosed to you previously. It's a complicated  
7 area. Although I'm not inclined to let him do that  
8 today. I think I would have to grant a continuance and  
9 the delay of the trial is one of the factors that weighs  
10 against reopening here. But if there's other admissible  
11 evidence, particularly including Mr. Harris's own  
12 statement, that would prove that for purposes of certain  
13 counts the company website is hosted in Russia, um, it's  
14 a jurisdictional matter. I have to weigh probative  
15 value against the -- and determine whether probative  
16 value is substantially outweighed by the risk of unfair  
17 prejudice.

18 We did many, many things on February 17th and I  
19 had just found your motion in limine before you came  
20 into court. You know, you said it was undisputed, in  
21 effect, that it had been in Russia and it was moved to  
22 Arizona and your concern is with the reference to  
23 Russia. So right now I think the probative value of any  
24 statement by Mr. Harris that would tend to prove that  
25 the site was hosted in Russia is substantial. It might

1 be the only proof of an essential element. And I don't  
2 think a reference to Russia will substantially outweigh  
3 the probative value, but I understand your concern.

4 And, you know, if it was redacted and said  
5 "foreign country" or indeed if you just had a simple  
6 stipulation that didn't draw great attention to this,  
7 you know, just one more stipulation, you know: "At all  
8 times relevant to this case the site -- the TCNISO site  
9 was hosted on service outside of Massachusetts," just  
10 that, um, you know, I think that would cut through all  
11 of this. But I'm absolutely not ordering you to do  
12 this. Everything that's being said and the documents  
13 I'm pulling out of the file, um, you know, are  
14 influencing my evolving thinking.

15 If you want, I'll take a recess and, you know, let  
16 you think about all of this and talk about it. I don't  
17 want anybody to feel coerced into doing anything he or  
18 she doesn't want to do. And on the other hand, once  
19 I've heard enough, I'll decide what to do. But the one  
20 thing we can do is go and look at those statements by --  
21 the one thing I'll do, when you're talking, and if you  
22 have time you can do it, too, and if I find them  
23 promptly, I'll give them to you, but is to look at the  
24 statements that are subject to the motion in limine, you  
25 know, to see what would be going into evidence if I

1       allowed it to go into evidence.

2               MR. MCGINTY: Can I just make one point about  
3       this?

4               THE COURT: Yes.

5               MR. MCGINTY: The government says it was  
6       inadvertence in that it failed to ask a particular  
7       witness about a particular thing and the particular  
8       thing was relating to the internet and traffic on the  
9       internet. The government had not earlier, in its effort  
10      to get in the Russia chat, said this has a  
11      jurisdictional component, and had there been the thought  
12      on the government's part that this bore some  
13      jurisdictional significance, it presumably would have  
14      raised that in that connection. I don't see how the  
15      Court can aid the government in resurrecting something  
16      that the government never viewed as admissible or  
17      subject to proffer for the purpose that's now being  
18      suggested.

19              THE COURT: Right, that I understood they were  
20      offering it to prove the jurisdictional element, not  
21      just to prove consciousness of guilt.

22              MR. MCGINTY: I think they were presenting it  
23      in order to show that Mr. Harris had control over the  
24      website and made decisions about where the website would  
25      be hosted. In other words, it could have been in New

1 Jersey, it could have been in Germany. He made the  
2 decisions about where that website was hosted. That was  
3 the probative force.

4 (Pause.)

5 THE COURT: See, I'm looking at the draft of  
6 the February 17th, 2012 argument on this. You filed  
7 your motion late.

8 Here, Mr. McGinty, listen to this.

9 MR. MCGINTY: I heard you use the word "late."

10 THE COURT: Yeah, and this goes back to other  
11 matters of fairness.

12 I let you file all your motions late and, you  
13 know, if you hadn't made a serious error -- I accept  
14 your apology as I accept Ms. Sedky's, you know, that you  
15 overlooked the deadline. People make mistakes. If you  
16 had filed this when the motions in limine were due, the  
17 government would have had notice of it and all of this  
18 could have been done. Now I think the government's  
19 being prejudiced by your actions or that it at least  
20 contributes to the predicament we're in.

21 But anyway, here's what Mr. Bookbinder said when  
22 you filed it late, and I said I assume this is based on  
23 a recent disclosure. That I'd let you file it late. I  
24 told you earlier that you could file them even later  
25 than when you did. It was based on something the

1 government hadn't disclosed previously.

2 If we get into this, the government may tell me  
3 you had this for a long time, you just didn't notice it  
4 until later, but, I said, when you complained about the  
5 statements Mr. Harris made about the Russian web host, I  
6 asked Mr. Bookbinder, "Is this evidence that you want to  
7 present?" And Mr. Bookbinder said, "Your Honor, all I  
8 intended to elicit is simply that for a period of time  
9 the web was hosted at a hosting facility in Russia and  
10 then it was Mr. Harris who moved it back to GoDaddy in  
11 the United States in 2005 or 2006," and now, I think I  
12 was told yesterday, it was later. If it went to GoDaddy  
13 in 2005, that could be proven. I think the earliest  
14 wire communication is in 2005.

15 (Pause.)

16 THE COURT: And what we then went on to talk  
17 about, you know, is whether a court order could be  
18 enforced against a Russian company.

19 But basically I'm reminded that no one is perfect  
20 and that I made a mistake yesterday and you properly  
21 pointed it out to me, Mr. McGinty. But if all of this  
22 had been done on the schedule I ordered in December, I  
23 know that we wouldn't be having the jury sitting there  
24 for an hour now.

25 So we're going to take a break. I'm going to go

1 look at Mr. Harris's statements. You should think about  
2 what you want to do, talk to each other, and we'll see  
3 where we go from here. But before I take the break, why  
4 don't you do the voir dire of GoDaddy.

5 MR. MCGINTY: Actually could I have the break  
6 for that purpose as well?

7 THE COURT: Well, no, let's see. Let's hear  
8 what he has to say and then if you want I'll let you  
9 finish the voir dire after the break. Okay?

10 MR. MCGINTY: Thank you.

11 THE COURT: Because it may contribute, you  
12 know, to your making an informed judgment as to whether  
13 there's going to be a stipulation on any of this, and,  
14 as I said, it's entirely up to you. You'll make your  
15 decision and then I'll make mine once I know what I have  
16 to decide. Go ahead.

17 MR. BOOKBINDER: Thank you, your Honor.

18 Q. Special Agent Russell, are you familiar with the  
19 company, GoDaddy?

20 A. Yes, I am.

21 Q. What services does -- and how are you familiar with  
22 GoDaddy?

23 A. Um, through this investigation and prior  
24 investigations.

25 Q. And, um, what services does GoDaddy provide, as far



1 as you know?

2 A. Well, the main service that GoDaddy provides is web  
3 hosting.

4 Q. What's web hosting?

5 A. Um, the websites that individuals go to on the  
6 internet need to actually be posted on a server and  
7 published to the internet. Um, GoDaddy provides that  
8 service.

9 Q. All right. And, um, do you know where the company,  
10 the GoDaddy.com, is located?

11 A. Um, they're located in Arizona.

12 Q. How do you know that?

13 A. Again through this investigation and, um, prior  
14 investigations I served legal documents on GoDaddy and  
15 received, um, items in return from GoDaddy.

16 Q. So when you say "served legal documents," you're  
17 talking about things like search warrants and subpoenas?

18 A. That's correct.

19 Q. All right. And when you served them, how had you  
20 served them?

21 A. Um, usually by faxing the document over. Sometimes  
22 the document is mailed over and sometimes the documents  
23 are personally delivered over via agents and another FBI  
24 officer.

25 Q. So if you faxed them, um, you have to fax them to a

1 particular phone number, is that correct?

2 A. That's correct.

3 Q. And if you mail them you have to have a particular  
4 address?

5 A. That's correct.

6 Q. And if they're being served by hand, in those cases  
7 you instruct agents in a different office to go serve  
8 them by hand?

9 A. That's correct.

10 Q. So based on your experience -- and you testified  
11 that GoDaddy is located in Arizona, is that correct?

12 A. That's correct.

13 Q. Okay. Do you know what services GoDaddy provided to  
14 TCNISO?

15 A. They provided web hosting services.

16 Q. And, um --

17 THE COURT: How do you know that?

18 Q. How do you know that?

19 A. Um, a search warrant was served on GoDaddy and  
20 GoDaddy agreed to meet with us, to provide the records.

21 Q. And they provided you with records in return?

22 A. That's correct.

23 Q. And those records describe the services that were  
24 provided?

25 A. That's correct.

1 Q. Did they also provide you, in addition to that, with  
2 the actual content of the website?

3 A. Um, the search warrant, yes, they did.

4 Q. And did you review that content?

5 A. Yes, I did.

6 Q. And what did that content include or was it -- let  
7 me see if I can phrase this more artfully.

8 Did that content include the contents of the web  
9 page, the website?

10 A. Yes, it did.

11 (Pause.)

12 MR. BOOKBINDER: Could I have a moment, your  
13 Honor?

14 (Pause.)

15 Q. When did you serve that search warrant on GoDaddy,  
16 if you remember, approximately?

17 A. Um, within 2008. I don't remember the date exactly.

18 Q. And, um, do you know how long TCNISO used the  
19 GoDaddy services?

20 A. Um, I don't know the exact time period, but I know  
21 it was at least a couple of years.

22 Q. And how do you know that?

23 A. Um, it was the start of the services they listed on  
24 the reference provided by GoDaddy.

25 (Pause.)

1 MR. BOOKBINDER: Your Honor, if I could have a  
2 moment?

3 (Pause.)

4 MR. BOOKBINDER: That would be essentially all  
5 the government would seek to elicit, your Honor.

6 THE COURT: I've got a few questions. If  
7 Mr. McGinty has some --

8 Well, do you want to ask any questions now without  
9 prejudice to asking some more later?

10 MR. MCGINTY: I do, your Honor.

11

12 CROSS-EXAMINATION BY MR. MCGINTY:

13 Q. Agent Russell, you testified moments ago about how  
14 GoDaddy was located in Arizona. Am I remembering that  
15 right?

16 A. Correct.

17 Q. And you said you communicated with Arizona or you  
18 communicated with GoDaddy in Arizona, correct?

19 A. That's correct.

20 Q. Trying to get records from them, correct?

21 A. Correct.

22 Q. Okay. So you understand that there is some  
23 corporate office of some kind of GoDaddy in Arizona, am  
24 I right?

25 A. That's correct.

1 Q. Now, a corporate office is not necessarily the same  
2 as its server location. Would that be fair to say?

3 A. That would be fair to say.

4 Q. And server locations can be in multiple places, can  
5 they not?

6 A. That's correct.

7 Q. So a company could host its serving capabilities in  
8 a variety of different locations, am I right?

9 A. That's correct.

10 Q. And you don't know whether GoDaddy has a server  
11 capability in Massachusetts?

12 A. I do not.

13 Q. Um, are you aware that, um, some ISPs host their  
14 own, um, domain name servers?

15 A. Yes, I do.

16 Q. So that if I type in "Google," let's say, and I'm  
17 transmitting that through the Charter ISP, the Charter  
18 ISP would recognize that domain name, would they not?

19 A. I'm sorry. Can you repeat the question?

20 Q. Charter would recognize that domain name that I  
21 typed in?

22 A. Right, and the ISP --

23 Q. No, I'm not asking about the ISP, just would they  
24 recognize it.

25 A. Yes, they would.

1 Q. Okay. And if the ISP recognizes the domain name,  
2 isn't it the case that it then communicates back to the  
3 person sending the message, am I right?

4 A. That's correct.

5 Q. Okay. Um, you mentioned that, um --

6 THE COURT: Actually hold on just one second.

7 (Pause.)

8 THE COURT: Go ahead.

9 Q. You mentioned before that that data that is  
10 transmitted doesn't go through a route server. Do I  
11 understand that right?

12 A. That is correct.

13 Q. It basically just communicates with the route  
14 server, am I right?

15 A. Well, it communicates -- the communication is with  
16 the database, um, the website data doesn't go through  
17 the route server.

18 Q. Okay. So when I send a message, um, that indirectly  
19 communicates with the route server. Did I understand  
20 that right?

21 A. Again, all internet traffic is indirect  
22 communications with some type of server. There's no  
23 direct communications on the internet.

24 Q. So if I understand this right, then the servers are  
25 receiving indirectly, um, information that's part of a

1 transmission. Do I understand that right?

2 A. Well, what server are you --

3 MR. MCGINTY: Actually here's where I should  
4 break off. I mean, this is the problem of being  
5 uninformed and I am certainly --

6 THE COURT: Fair enough. And you actually  
7 asked a question I was going to ask, about the  
8 distinction between the location of corporate offices  
9 and the servers.

10 Well, I'm going to go take a look at Mr. Harris's  
11 own statements, because I never really ruled on that  
12 motion in limine because I thought it related to a  
13 matter that was characterized as undisputed by the  
14 defendant, and you can think about your positions and  
15 talk about whether you want to enter into some  
16 stipulation on this.

17 Again, just to be as transparent as possible and  
18 this is, by no means, a final answer, um, but if there's  
19 no stipulation and there are statements by Mr. Harris  
20 that were subject to the motion in limine filed late,  
21 um, I may permit the admission of those statements, but  
22 not before giving you a chance to address it. But  
23 that's just where I am in this fluid situation.

24 The Court is in recess.

25 (Recess, 10:30 a.m.)

1 (Resuming, 11:00 a.m.)

2 THE COURT: Okay. It's 11:00. What are the  
3 parties's present positions?

4 MR. MCGINTY: Your Honor, I think we've  
5 reached a resolution here. Um, the Court had suggested  
6 a stipulation and, um, it is -- as I wrote it down,  
7 exactly what the parties would agree to, which is --

8 THE COURT: Okay. Go ahead.

9 MR. MCGINTY: That "At all relevant times the  
10 TCNISO website was hosted on server" -- I should put  
11 there "on a server located outside of Massachusetts."

12 MR. BOOKBINDER: Yes.

13 MR. MCGINTY: -- "on a server located outside  
14 of Massachusetts."

15 THE COURT: Okay. All right.

16 You can step down.

17 (Witness leaves.)

18 THE COURT: And so -- and let me just ask  
19 this.

20 Mr. Harris -- may I ask Mr. Harris just a couple  
21 of questions, Mr. McGinty, and if the two of you want to  
22 talk, just tell me.

23 MR. MCGINTY: Yes, your Honor.

24 THE COURT: Okay.

25 Mr. Harris, you've been at the sidebar for the



1 sidebar conferences and I've seen you conferring with  
2 your attorney and, um, his colleague.

3 Do you feel you understand -- here.

4 You understand that I've been told that in the  
5 circumstances that you've been observing, um, that you  
6 want to agree with the government, um, that the jury can  
7 be told, as a stipulation, that at all relevant times  
8 the TCNISO website was hosted on a server outside of  
9 Massachusetts. Do you understand that's the proposed  
10 stipulation?

11 THE DEFENDANT: Yes, I do.

12 THE COURT: And do you understand that as a  
13 result of that I'll tell the jury that they, you know,  
14 may find that that fact is true? That that's what a  
15 stipulation is.

16 THE DEFENDANT: I understand.

17 THE COURT: And do you understand that I  
18 haven't made a final decision as to what additional  
19 evidence, if any, I would let the jury hear in the  
20 absence of a stipulation like that?

21 THE DEFENDANT: I do.

22 THE COURT: And have you talked with your  
23 lawyer about whether you want to enter into that  
24 stipulation?

25 THE DEFENDANT: I have.

1           THE COURT: And do you indeed want to enter  
2 into that stipulation?

3           THE DEFENDANT: Yes.

4           THE COURT: All right. And are you still  
5 fully satisfied with Mr. McGinty's representation of  
6 you?

7           THE DEFENDANT: Yes.

8           THE COURT: He's doing a good job, I think.

9           All right. Well, I'm satisfied that you're  
10 competent, you're acting knowingly and voluntarily,  
11 you're effectively represented, and this stipulation is  
12 appropriate. Thank you.

13          You may be seated.

14          So I'm going to permit that. The jury, when they  
15 come back, will be told that there's an additional  
16 stipulation.

17          All right. Let me go back.

18          (Pause.)

19          THE COURT: Now, there was a question of  
20 whether the redactions that Mr. McGinty requested  
21 yesterday of all of the allegations leading up to the  
22 charging language, whether all the paragraphs leading up  
23 to the charging language should be redacted?

24          MR. BOOKBINDER: Your Honor, in an effort to  
25 try to save time here and in the spirit of accommodation

1       that we all seem to be working towards, the government  
2       does not object to Mr. McGinty's request, and if the  
3       Court would like to use the version that we've provided  
4       that redacts all of that language, that's not a problem.

5               THE COURT:   And, Mr. McGinty, is that what you  
6       would like?

7               MR. MCGINTY:   That's 100 percent correct.

8               THE COURT:   All right.

9               Now we're back to where we were about this time  
10       yesterday because that's what I would have decided if  
11       the matter had been brought up in the overall  
12       circumstances.

13              Now, the jury instructions.  Let me -- I'm going  
14       to give the jury instructions in three parts.  The first  
15       part will be general instructions that would apply in  
16       any criminal trial, including a reminder of the  
17       fundamental principles such as the presumption of  
18       innocence, um, the government's duty to prove the  
19       defendant guilty beyond a reasonable doubt, and the fact  
20       that the defendant has no burden.  And the jury may not  
21       consider the fact that he didn't testify as an  
22       indication that he's guilty.  They shouldn't discuss or  
23       consider that at all.

24              I'm going to give them a definition of reasonable  
25       doubt that's consistent with the instruction the First

1 Circuit has approved in **Cleveland**, 106 F.3d 1056 at 1062  
2 to 1063, and **O'Shea**, 426 F.3d 475 at 482.

3 In addition to the standard instructions about how  
4 to evaluate evidence, I will give an immunized witness  
5 instruction along the lines that I mentioned or  
6 described yesterday.

7 Does the government still want me to say something  
8 to the effect that the preparation or meeting with  
9 witnesses is permissible, but the jury can consider the  
10 fact that a witness met with one party or another in  
11 deciding whether the testimony was biased and whether he  
12 was influenced by any meeting. Do you want that  
13 instruction?

14 MS. SEDKY: No, we don't have a problem with  
15 that.

16 MR. MCGINTY: Actually I like it.

17 (Laughter.)

18 THE COURT: Well, do you want me to do it?

19 MR. MCGINTY: Actually I would, in that form,  
20 yes.

21 THE COURT: All right. I'll give it.

22 Does the government want me to give an  
23 instruction -- does either party want me to give an  
24 instruction that it's permissible to use an undercover  
25 operation to surreptitiously acquire evidence?

1 MS. SEDKY: Your Honor, we're pretty agnostic  
2 and don't see the need for that instruction.

3 THE COURT: All right. And I'll give them an  
4 instruction on expert witnesses.

5 Is there a request for an instruction, by either  
6 side, on consciousness of guilt?

7 MS. SEDKY: There is, your Honor, from the  
8 government.

9 THE COURT: All right.

10 MR. MCGINTY: I obviously would object to  
11 that.

12 THE COURT: Well, let's see. What's the  
13 evidence that is arguably consciousness of guilt?

14 MS. SEDKY: Well, we have his own statements  
15 where he talks about his clandestine residence in Hong  
16 Kong. We have his own statements to I believe it was  
17 Mr. T where he says, "I'm a professional hacker. I'm  
18 paranoid to answer my front door." We have his  
19 statements -- we have Mr. Phillips's testimony that one  
20 of the reasons he wanted to incorporate was to protect  
21 himself from -- well, to protect his assets. We have  
22 his use of an alias on every single part and piece of  
23 his website, anywhere, every host, every e-mail. We  
24 have the book being published under the name "DerEngel"  
25 with one tiny print copyright owner, no caption under

1 the photo.

2 THE COURT: Okay.

3 MR. MCGINTY: Your Honor, the consciousness of  
4 guilt has to be probative of a charge and the fact that  
5 someone is concerned about civil liability, um, that  
6 someone is contemplating going into a corporate forum to  
7 spare themselves the, um, liability for lawsuits or  
8 claims about copyright infringement and all of that, um,  
9 apart from being appropriate business planning, hardly  
10 speaks to the consciousness of guilt of possible  
11 criminal conduct.

12 The risk here is that the consciousness of guilt  
13 instruction will conflate the intent requirement and  
14 ease the government's way to a --

15 THE COURT: I don't think it will. Part of  
16 what I'll say is, you know:

17 "You have to decide whether a statement was made  
18 and if so whether it was false. Similarly you should  
19 decide whether the defendant did something to conceal  
20 information. If so, you should decide whether any false  
21 statement or effort to conceal is evidence of a  
22 consciousness of guilt concerning any or all of the  
23 crimes charged in this case. Feelings of guilt may  
24 exist in innocent people and false statements or acts of  
25 concealment do not necessarily reflect actual guilt of

1 particular crimes. In your consideration of the  
2 evidence, of the alleged false statements and alleged  
3 acts of concealment, you should consider that there may  
4 be reasons for a person's actions that are fully  
5 consistent with innocence of the crimes charged in this  
6 case. It is up to you to decide if there is proof of  
7 false statements or acts of concealment and if so  
8 whether they show a consciousness of guilt concerning  
9 the crimes charged here. If these facts are proven, you  
10 must decide what weight or significance to give them."

11 Does the government still want the instruction?

12 MS. SEDKY: We do, your Honor.

13 MR. MCGINTY: I don't, your Honor.

14 And, you know, the facts the government has  
15 pointed to that they claim are supportive of  
16 consciousness of guilt include a book that has his name  
17 in it and on the back page a photograph of himself and  
18 his wife, um, the book is sold on the website and is  
19 available --

20 THE COURT: Here's -- here's -- I'm not going  
21 to make -- I'm inclined to give it. I don't make a  
22 final decision as to what I'm going to instruct until I  
23 hear the closing arguments. But I actually -- well,  
24 you'll listen to them, too. This has been a little  
25 circular, but I raised consciousness of guilt early on.

1 You didn't care for it. At some point in the course of  
2 the case since then, you suggested there should be one.  
3 The government's going to make this argument --

4 MR. MCGINTY: I have never suggested that I  
5 want a consciousness of guilt --

6 THE COURT: I think I may have -- well, it  
7 doesn't matter, but I think I may have misunderstood.

8 Let's wait until after the arguments and then we  
9 can discuss this again. But part of the reason I'm  
10 inclined to do it is this is what the government's going  
11 to argue and if I don't try to sort it out in this  
12 fashion, um, then I think the jury may be confused.

13 But I'll reserve on whether I'm going to give that  
14 instruction.

15 MR. MCGINTY: They may argue it, but my  
16 suggestion is that their argument is going to be, um,  
17 against the weight of the facts and a Court instruction  
18 that highlights that sort of contributes, I think, to  
19 the impression that such evidence exists.

20 THE COURT: All right. Well, I'll continue to  
21 consider that.

22 Then with regard to the case-specific  
23 instructions.

24 (Pause.)

25 THE COURT: Then with regard to the case-



1 specific instructions, at the moment -- and then we'll  
2 see about whether I'm going to say something further  
3 based on the defendant's supplemental proposed jury  
4 instruction filed this morning. Well, it was filed  
5 maybe last night.

6 At the moment it's my intention to essentially  
7 give mail fraud instructions that are in my own words  
8 and somewhat tailored to this case, um, but instructions  
9 that amplify the First Circuit pattern instructions on  
10 mail fraud. I have thought, until I got Mr. McGinty's  
11 motion, so now I'm thinking again, but I had tentatively  
12 decided that I was going to say nothing based on **Direct**  
13 **Sales** and buyer/seller because **Direct Sales** is a  
14 conspiracy case, um, and the other cases that we dealt  
15 with were conspiracy cases, and in my preliminary  
16 instructions I asked you -- and I think none of us had  
17 thought about it, but you said, "Yeah, it's okay," you  
18 know, "say the same thing for mail fraud." So I had a  
19 line in the preliminary instructions. But we'll come  
20 back to that.

21 But basically, you know, I'm going to tell them  
22 there are eight charges of wire fraud, that the, you  
23 know, the conspiracy charge has been removed. Um, I'm  
24 going to -- as the First Circuit does, I'm going to read  
25 them Paragraph 55 and Counts 2 through 9 and tell them

1       that:

2               "To prove the defendant committed a wire fraud in  
3       this case the government must prove the following things  
4       beyond a reasonable doubt. First, that there was a  
5       scheme substantially as charged in the superseding  
6       indictment to defraud or obtain something of value from  
7       internet service providers by means of false or  
8       fraudulent pretenses. Second, that the defendant  
9       knowingly and willfully participated in the scheme with  
10      an intent to defraud. And third, that on or about the  
11      dates alleged, the defendant transmitted or caused to be  
12      transmitted an interstate wire communication for the  
13      purpose of furthering the scheme."

14             So that's essentially the black letter law.

15             I'm going to tell them that:

16             "It has to be proven that the defendant  
17      participated in a scheme to defraud that involved  
18      material, false or fraudulent pretenses." I'll tell  
19      them either: "While a scheme is a plan of coercive  
20      conduct, in terms of fraud, it means to deprive someone  
21      of something of value by means of deception or  
22      cheating. A scheme to defraud ordinarily includes a  
23      desire to bring about some gain or benefit to oneself or  
24      some other person or a desire to cause some loss to  
25      someone else. The term 'false or fraudulent pretenses'

1 means any intentional material false representation or  
2 omission including material direct false representations  
3 and deliberate concealment of material facts. A fact is  
4 material if it has a natural tendency to influence or is  
5 capable of influencing whoever or whatever is making a  
6 particular decision.

7 In essence, in this case the government must,  
8 among other things, prove beyond a reasonable doubt the  
9 existence of a scheme to deprive internet service  
10 providers of payment for internet service based on  
11 intentional material false representations or omissions  
12 concerning whether a particular device was authorized to  
13 receive such service. While the government must prove  
14 that the scheme alleged in the indictment existed, it  
15 does not have to prove it succeeded."

16 Then I'll define for them "knowing" and "willful"  
17 in customary ways and tell them that:

18 "An intent to defraud means to act knowingly with  
19 specific intent to deceive with a purpose of causing  
20 some financial loss or to obtain money for the defendant  
21 or someone else for the bulk of these purposes."

22 And with regard to the interstate wire  
23 communications, I'll tell them:

24 "The last thing the government must prove beyond a  
25 reasonable doubt is that on or about the date alleged in

1 the indictment, for the counts you're considering, the  
2 defendant transmitted or caused to be transmitted an  
3 interstate wire communication in furtherance of the  
4 alleged scheme. The use of the internet to send a  
5 message such as an e-mail or a communication to a  
6 website may be a wire communication. An interstate wire  
7 communication is a wire communication from one state to  
8 another. A wire communication does not have to be  
9 essential to the scheme or be itself fraudulent, however  
10 it must be made as part of an attempt to execute the  
11 scheme to accomplish one of its goals.

12 To prove that the defendant caused a particular  
13 interstate wire communication to occur, the government  
14 does not have to prove that he sent the wire  
15 communication himself. It would be sufficient if the  
16 government proved beyond a reasonable doubt that he knew  
17 that the use of interstate wires would follow in the  
18 course of the scheme or that it was reasonably  
19 foreseeable that the interstate wires would be used as a  
20 result of his actions." This is based on **Silvano**,  
21 812 -- well, let me go on. -- "of his actions. It is  
22 the use of interstate wires generally rather than the  
23 specific wire transmission that is charged that must be  
24 proved to have been reasonably foreseeable as a result  
25 of the scheme.

1           Therefore, if it is proven that Harris  
2       participated in the alleged scheme and did something  
3       relating to it which he knew or reasonably should have  
4       foreseen would result in interstate wire transmissions  
5       being used in an effort to execute that scheme or  
6       accomplish its goals, you may find the use of interstate  
7       wire communication -- you may find the use of interstate  
8       wire communication an element to be proven."

9           That's essentially the substantive part.

10          Putting aside for the moment the issue Mr. McGinty  
11       raised this morning, does anybody have a comment or  
12       concern about what I've just given you?

13               MS. SEDKY:   No, your Honor.

14               MR. MCGINTY:   Would your Honor just repeat the  
15       part where you mentioned that the government has to  
16       prove a scheme.   You mentioned it's the intentional  
17       material omission concerning whether a particular device  
18       was authorized to receive such service.   I want to make  
19       sure that I --

20               THE COURT:   All right.   I will give you that  
21       again, and I'm trying to tailor it to this case.

22               I'll say:   "In essence, in this case the  
23       government must, among other things, prove beyond a  
24       reasonable doubt the existence of a scheme to deprive  
25       internet service providers of payment for internet

1 service based on intentional material false  
2 representations or omissions concerning whether a  
3 particular device was authorized to receive such  
4 service."

5 Okay?

6 MR. MCGINTY: Based on representations  
7 relating to that particular device and whether it's  
8 authorized to receive --

9 THE COURT: What I'm trying to capture here is  
10 -- what I understand to really be the essence of the  
11 scheme is hardware and software that misrepresent the  
12 MAC address of the device getting internet service and  
13 as a result getting it for free or paying less than  
14 would otherwise be due. That's the concept I'm trying  
15 to capture. And, you know, I could probably pencil in  
16 what Mr. McGinty requested, but there doesn't seem to be  
17 much of a distinction.

18 MR. MCGINTY: I submit that it does, because  
19 the hardware misrepresented, um --

20 (Pause.)

21 THE COURT: Go ahead.

22 MR. MCGINTY: That the hardware  
23 misrepresented, um, the right to receive service is the  
24 hardware that has imported into it the identifiers which  
25 you see, those are not in the machine until those are

1 put in them, or it's not in the modem until it's put  
2 in. So it's a particularized representation by a  
3 particularized machine, or modem.

4 THE COURT: All right. I'll consider that.  
5 Then --

6 (Pause.)

7 THE COURT: All right. And, Mr. McGinty,  
8 you've got that request for a supplemental instruction  
9 derived from --

10 MR. MCGINTY: Well, your Honor, I want to  
11 address one thing, which is --

12 THE COURT: Okay.

13 MR. MCGINTY: The Court had mentioned that  
14 there were eight charges of wire fraud. In view of the  
15 stipulation, there are no longer eight.

16 THE COURT: How many are there?

17 MR. MCGINTY: Well, there are five -- I'm  
18 sorry, three.

19 THE COURT: No, there are eight.

20 MR. MCGINTY: Well, if the stipulation is to  
21 TCNISO having a website hosted out of Massachusetts, the  
22 access to the website, for purpose of ordering a  
23 product, was alleged in counts --

24 THE COURT: Hold on just one second. I've got  
25 a lot of paper here and I now need to lay my hands on

1 the indictment.

2 (Pause.)

3 THE COURT: Go ahead.

4 MR. MCGINTY: The government broke out the --  
5 they originally broke out the wire fraud counts and when  
6 they broke it out, it broke it out in terms of the wire  
7 fraud, the wire being the connection in which it was  
8 obtaining the hardware and then the wire in connection  
9 with the use of the firmware. The three counts that  
10 allege the obtaining are linked to the TCNISO website,  
11 which is stipulated in the subject of interstate  
12 activity. The communications that are outside that, um,  
13 are not similarly subject to stipulation and have no,  
14 um, underpinning of support as an interstate wire. Um,  
15 so those counts are, on the stipulation, um, failing.

16 THE COURT: Well, they arguably need other  
17 evidence.

18 MR. BOOKBINDER: Yes, your Honor, if I could  
19 just address that.

20 So if we could just go through them count by  
21 count.

22 Count 1 is Mr. Hanshaw's downloading --

23 THE COURT: And that's the stipulation?

24 MR. BOOKBINDER: Right, and he testified he  
25 downloaded from the website.



1 THE COURT: But there's the stipulation --

2 MR. BOOKBINDER: And the stipulation is that  
3 the website was in Massachusetts.

4 THE COURT: Right.

5 MR. BOOKBINDER: That's Count 2, also. Again  
6 he accessed the internet, he downloaded the Sigma X.  
7 This is the one, if you remember, where he got the --

8 THE COURT: So that survives as a result of  
9 the stipulation?

10 MR. BOOKBINDER: Well, he was given the code.

11 Um, so Counts 3 and 4, Mr. McGinty is right, they  
12 don't involve going to the TCNISO.

13 THE COURT: Well, I don't know, I think we've  
14 been talking about wrong numbers. Hold on a second.  
15 Let me have --

16 Does somebody have an extra copy of the new  
17 indictment?

18 MR. BOOKBINDER: We do, your Honor.

19 (Passes up to judge.)

20 THE COURT: In fact, do you have one more copy  
21 of this that I can give to my law clerk? Oh, we're  
22 okay. We're okay.

23 MR. BOOKBINDER: Thank you, your Honor.

24 THE COURT: So Number 1 and Number 2, the  
25 interstate wire would be covered by the stipulation,

1 correct?

2 MR. BOOKBINDER: Correct. Numbers 3 and 4, it  
3 is not. However, those ones we have Exhibits 10 and 11,  
4 which were the chats that Mr. Hanshaw engaged in, on  
5 those particular dates, with someone who he testified  
6 was in Washington state.

7 THE COURT: Mr. Dennis.

8 MR. BOOKBINDER: Mr. Dennis.

9 THE COURT: So, Mr. McGinty, I thought that  
10 testimony was sufficient for 3 and 4.

11 MR. MCGINTY: I think that's right.

12 Can I just address 2? Um, the allegation here is  
13 that he accessed the internet and he downloaded it. His  
14 testimony was that he got it from Isabella Lindquist.  
15 In other words, he got it, um, through that deal where  
16 he had offered her, for the raw code, the \$100 and then  
17 reneged on it, shall we say.

18 MR. BOOKBINDER: And, your Honor, actually I  
19 don't think that's the testimony. The testimony is he  
20 got the source code from her after she left the  
21 company. But he testified that he downloaded Sigma X  
22 from the website using the key that Chris Watts gave to  
23 him. And obviously we can disagree about that, but --

24 THE COURT: All right. Okay. That's  
25 consistent with my present memory. And if we get a

1 conviction and I get a post-trial motion, um, this will  
2 go further under the microscope. But go ahead.

3 MR. BOOKBINDER: Okay. So I think we're up to  
4 4.

5 Count 5 is Jose Larosa going to the website. So  
6 that's covered by the stipulation.

7 Count 6 is not the website -- well, Count 6 talks  
8 about Jose Larosa accessing the internet, but what his  
9 testimony was was that he went on the internet and he  
10 went back to the website, he ordered more products, and  
11 he also had e-mail communications with someone at TCNISO  
12 and we have testimony and a stipulation that the company  
13 was located in San Diego.

14 THE COURT: Keep going.

15 MR. BOOKBINDER: So that covers 6.

16 Number 7 is Mr. Madeira going to the website. So  
17 that's covered by the stipulation.

18 Number 8, your Honor, I think Mr. McGinty may have  
19 a point, which is Mr. Madeira accessing the internet  
20 from Massachusetts. And I don't -- um, he -- I don't  
21 believe that we have evidence -- he testified that he  
22 went back to the website to get directions about how to  
23 use, um --

24 If I could just have a moment, your Honor?

25 (Pause.)

1 MR. BOOKBINDER: No, that's right.

2 Um, Ms. Sedky reminds me that his testimony was  
3 that he had to go back to the website and get, first of  
4 all, use the tutorials to get information and also to  
5 download it, I think, once again the software because it  
6 didn't work the first time. So I would suggest that it  
7 was not just his ordering, but his use actually that  
8 brought him back to the website. So I think we're  
9 actually covered on Count 8, too.

10 THE COURT: Okay.

11 Well, I'm not granting a Rule 29 motion on any of  
12 these at this time and I've reserved judgment on all of  
13 them.

14 Mr. McGinty, are you still -- do you still want me  
15 to say something else related to your supplemental  
16 proposed jury instruction filed last night because, as I  
17 said, I thought I would essentially leave it to  
18 argument, although it's possible you would persuade me  
19 to add something along the lines that I said in  
20 preliminary instructions.

21 MR. MCGINTY: Your Honor, what this tries to  
22 capture is the idea that there's mixed -- you know,  
23 where there's mixed evidence, um, the **Sawyer** issue, um,  
24 where there's mixed evidence relating to activities, the  
25 jury ought to be told that there has to be some

1 additional evidence that establishes that that activity  
2 is wrongful activity.

3 THE COURT: Well, no, actually not that it's  
4 wrongful, that it's the crime charged in this case. I  
5 was emersed in **Sawyer** last year, in **DiMasi**, and I think  
6 those honest services fraud cases that implicate  
7 violations of state statutes, like the gratuity statute,  
8 are unusual, um, arguably unique, they raise a high risk  
9 that the jury would be confused and find that a  
10 violation of the state gratuity statute was synonymous  
11 with a violation of the wire fraud statute. So I don't  
12 think anything further is legally required.

13 However, I am willing to consider saying, and  
14 maybe it would be your agreement, essentially what I  
15 said at the beginning. I'd say something like this:  
16 "It would not be enough to prove wire fraud to prove  
17 that Harris only sold the product to someone he knew  
18 would use it to commit a crime. However, the nature of  
19 the product sold and any knowledge Harris had as to how  
20 it would be used are evidence that you can consider,  
21 along with all the other evidence, in deciding whether  
22 the government has proven any or all of the wire fraud  
23 charges beyond a reasonable doubt."

24 Does the government have a problem with that?

25 MR. BOOKBINDER: Could we have a minute, your

1 Honor?

2 (Pause.)

3 MS. SEDKY: Your Honor, I -- I guess the  
4 government's position is that we believe that this is  
5 sort of a **Direct Sales** derivative instruction and given  
6 the fact that we are not instructing on aiding and  
7 abetting in this context, it really does loosen the link  
8 between the seller and the buyer in terms of what our  
9 burden of proof is. And so we don't think that this,  
10 um, this instruction is required when we are really  
11 focusing on a principal wire fraud, it's Harris's  
12 scheme, and it's really about his intent to defraud the  
13 cable company, not his -- the sort of parameters of his  
14 relationship with his buyers.

15 THE COURT: All right.

16 And, Mr. McGinty, what's your reaction to what I  
17 had proposed to say?

18 MR. MCGINTY: I would ask the Court to give  
19 that instruction.

20 THE COURT: Well, I guess I'll consider it.

21 Now it's 11:30 and I think that ends everything I  
22 wanted to discuss with you before I had you argue to the  
23 jury.

24 (Pause.)

25 THE COURT: Okay. I think what I'll do is

1 I'll have the jury in, we'll have the government's --  
2 I'll give you a short break. I have to clean up the  
3 bench and you need to get focused.

4 I'll have them in. We'll have the government's  
5 argument. I understand it may take 45 minutes. We'll  
6 have the stipulation and the government's argument and  
7 then maybe I'll let them go to lunch and by that time it  
8 will be at least 12:30. Then we'll have the defendant's  
9 argument and the rebuttal, we'll take a brief break, and  
10 then I'll instruct them. Then they'll go home and when  
11 they come back tomorrow morning, they'll ask me to  
12 instruct them again. That's what happens when you get  
13 started so late.

14 Does that sound like a reasonable way to proceed?

15 MR. BOOKBINDER: Yes, your Honor.

16 Do you intend to have them start deliberating  
17 today or --

18 THE COURT: We'll see what time it is, but,  
19 yes.

20 MR. BOOKBINDER: Thank you.

21 THE COURT: All right?

22 Okay. We're -- and you're going off to change the  
23 verdict form, which we'll work on now.

24 All right. We're going to be in recess until  
25 quarter of 12:00 and I'll ask Mr. Hohler to let them

1 know we're starting at quarter of 12:00.

2 (Recess, 11:35 a.m.)

3 (Resumed, 11:50 a.m.)

4 THE COURT: All right. Let's see. We'll get  
5 the jury.

6 Who should tell them about the stipulation, do you  
7 want me to do that?

8 MR. MCGINTY: Yes, I would prefer that, your  
9 Honor.

10 THE COURT: I will tell them that the parties  
11 have agreed and they may accept it as true that at all  
12 relevant times that the TCNISO website was hosted on a  
13 server outside of Massachusetts. Okay?

14 The Government will have 45 minutes for its  
15 closing.

16 All right. Let's get the jury.

17 MR. BOOKBINDER: Your Honor, it is worth  
18 noting that I do intend to refer to a handful of  
19 exhibits during the course of the closing and so I'd ask  
20 that the Court have the jury monitors on and so we can  
21 show those to the jury.

22 THE COURT: Sure.

23 MR. BOOKBINDER: Your Honor, I'll also be  
24 using a chart which has the counts as I believe  
25 Mr. McGinty requested and as I set out in the



1 indictment.

2 (Shows to Mr. McGinty.)

3 THE COURT: Okay? We'll get the jurors.

4 (Jury enters, 11:50 a.m.)

5 THE COURT: Ladies and gentlemen, good  
6 morning. Welcome back. I apologize for having kept you  
7 waiting so long. We've been working ever since you left  
8 yesterday. It just seems to be in the nature of trials  
9 that even those that go very smoothly and efficiently up  
10 to a point, they develop issues towards the end. But  
11 we're now ready for the closing arguments.

12 As I'm going to explain to you in my jury  
13 instructions, the case has legally become more focused,  
14 you're only going to have to decide the wire fraud  
15 charges, not the conspiracy charge. So I'll tell you  
16 that now and repeat it later so you're not sitting there  
17 thinking, "Why are we not hearing any argument on  
18 conspiracy?"

19 I've given the parties up to an hour each for  
20 their closing arguments. Because the government has the  
21 burden of proof, it goes first and then has an  
22 opportunity for a brief rebuttal. It's my intention  
23 that we hear the government's closing argument. I'll  
24 send you to lunch.

25 Lunch has been ordered, I assume?

1 THE CLERK: Yes, Judge.

2 THE COURT: I'll send you to lunch.

3 You'll come back. You'll hear the defendant's  
4 closing argument. You'll hear the government's  
5 rebuttal. I'll give you another break. And then I'll  
6 give you instructions depending on what time it is. I  
7 might have to instruct you in the morning. We'll see.  
8 Okay?

9 But I thank you, if not for your patience, for  
10 your perseverance, but famous last words. But I think  
11 we're ready to go.

12 Mr. Bookbinder. Oh, and actually before we go --  
13 before you go, I need to tell you something.

14 You remember that a stipulation is something the  
15 parties agree is true and you may accept as true in  
16 deciding the case. Since you left yesterday, the  
17 parties have stipulated and agreed that at all times  
18 relevant to this case, the TCNISO website was hosted on  
19 a server outside of Massachusetts. Okay?

20 All right. The closing arguments.

21

22 CLOSING ARGUMENT BY MR. BOOKBINDER:

23 Good afternoon.

24 THE COURT: I'm sorry, Mr. Bookbinder. I  
25 failed to give you -- I don't want to break my almost 27

1 year streak.

2 Remember I told you at the beginning of the case  
3 -- because I always tell the jury the same thing, that  
4 what the lawyers say is not evidence? But this is the  
5 opportunity the lawyers have to argue the evidence as  
6 they remember it and to argue what inferences they think  
7 you should draw from the evidence. I've again taken  
8 your notebooks away. I want you to listen to this and I  
9 want you to keep in mind that it's not itself evidence.

10 All right. You're on.

11 MR. BOOKBINDER: The testimony you've heard  
12 and the exhibits you've seen over the past week prove  
13 that Ryan Harris, the defendant, came up with and  
14 participated in a scheme to defraud the ISPs, the  
15 Internet Service Providers. He designed and he sold  
16 products that he intended for people to use to steal  
17 internet access. And he and his customers used his  
18 modems and his software for just that purpose.

19 The evidence you've heard also proves that he did  
20 this for basically three reasons. First, he wanted free  
21 and super fast internet access for himself. Second, he  
22 wanted to make a lot of money selling these products to  
23 other people. And third, he wanted to punish the ISPs  
24 for charging for internet service which he thought ought  
25 to be free.

1           So if that's generally what the evidence proved,  
2           then you may be wondering what it is more specifically  
3           we have to show for you to find the defendant guilty of  
4           wire fraud. And that's what I want to spend most of my  
5           time talking about.

6           The judge is going to instruct you on the -- what  
7           are called the elements of wire fraud and it's his  
8           instructions that will guide you during your  
9           deliberation, but to help you consider the evidence that  
10          you've heard and that I'm going to talk about, I want to  
11          talk to you a little bit about how that evidence fits  
12          into the wire fraud framework. And so I'm going to talk  
13          a little bit about what I anticipate the judge will  
14          instruct are the elements.

15          The first is that there be a scheme to defraud  
16          involving a material misrepresentation. Secondly, the  
17          defendant's willful participation in that scheme with  
18          the intent to defraud. And third, a reasonably  
19          foreseeable interstate wire communication in furtherance  
20          of that scheme. What I want to discuss now is how the  
21          evidence that you've heard satisfies each of those  
22          elements and proves that Ryan Harris committed wire  
23          fraud.

24          Let's start with the scheme to defraud. Now, how  
25          do you know that this was a scheme to defraud? Well,

1 we'll begin by talking about the products, the products  
2 that he designed, the products that he sold, and the  
3 evidence has shown that these are products with one  
4 purpose and that was stealing internet service.

5 Let start with the sniffer program. Do you  
6 remember the testimony about that? The sniffer program  
7 that Mr. Harris added to his Sigma product helped users  
8 eavesdrop on their neighbor's internet connection and  
9 when they were doing that it allowed them to pick up,  
10 and to copy and to keep, their neighbor's MAC addresses  
11 and configuration files.

12 You may remember the testimony from Mr. Kohler,  
13 the employee of Motorola, the company that made the  
14 modems, and also from Mr. Brodfuehrer, who worked for  
15 Charter, the internet service provider you heard from,  
16 and they both told you that there is no reason why a  
17 user would be sniffing to pick up their neighbor's  
18 traffic, their neighbor's MAC addresses and  
19 configuration files, unless they were looking to steal  
20 service.

21 You may also remember that one of the chats that  
22 we saw, and I believe it was yesterday morning, a chat  
23 between Mr. Harris and someone using the name MooreR,  
24 um, and that person, as discussed in the chat, is the  
25 person who actually wrote the sniffer program for Ryan

1 Harris. In the chat Mr. Harris comes up with a list of  
2 possible names for that program. MooreR then narrows  
3 the list down to two that he thinks might work and then  
4 ultimately it's Ryan Harris who says, "I prefer  
5 CoaxThief, it has an edge to it." And that's what he  
6 said in Exhibit 21 and, before I go any further, I want  
7 to mention that you're going to have all those exhibits  
8 with you back in the jury room. I suggest you take a  
9 look at them and you'll see that chat. So it's Ryan  
10 Harris who picks the name "CoaxThief" for his sniffer  
11 product and that tells you pretty much all you need to  
12 know. It tells you about the product, what it was  
13 designed for, it tells you what Mr. Harris's intent was  
14 for it. And so you've got the sniffer function and then  
15 you've also got the MAC changer function, something else  
16 you heard testimony about.

17 Ryan Harris, the first thing he asked Isabella  
18 Lindquist to do for him was to write this MAC changer  
19 function for his program and it was designed to allow  
20 the user to change their MAC address, from the one that  
21 came with their modem, to one that they had either  
22 sniffed from one of their neighbors or traded for from  
23 somewhere else. And then it allowed the TCNISO user to,  
24 what was described as "cloning," to clone the modem of  
25 the person whose MAC address they were using, the paying

1 subscriber, and to get -- to misrepresent to the  
2 internet service provider that they were that paying  
3 subscriber and to get service that they hadn't paid for  
4 that someone else had. Mr. Kohler, Mr. Brodfuehrer,  
5 again, told you that as with sniffing for the MACs,  
6 using this program to change your MAC address, the only  
7 reason anybody would do this was to steal service.

8 And the next function in Mr. Harris's software  
9 that I want to talk about is the uncapping function.

10 There was a lot of testimony about uncapping.

11 Uncapping, you heard, removes the limits, the speed  
12 limits on your service. It lets you get as much service  
13 that that modem is capable of. And you heard that this  
14 is also theft of service. Here what you're stealing --  
15 you could be a paying customer paying for basic slow-  
16 level service, but now what you're stealing, if you're  
17 uncapping, is you're stealing premium faster service  
18 that you're getting without paying for it. What  
19 Mr. Harris's product did was to let people take as much  
20 bandwidth as they wanted, without paying, and again  
21 that's stealing.

22 A couple of other features I want to touch on. In  
23 his Sigma products and in his other software were things  
24 called "Stealth Mode" and the update blocking function.  
25 You heard testimony that Stealth Mode prevented the

1 internet service providers, the ISPs, from seeing what  
2 software was running on the TCNISO user's modem, so that  
3 the ISP couldn't identify it as a modem that was  
4 stealing service and it couldn't knock that person off  
5 the network.

6 The update blocker does something a little bit  
7 different, which is it prevents the modem from receiving  
8 standard updates that cable companies would send out  
9 over time upgrading their service, upgrading their  
10 modems, and the reason it did that is because if the  
11 modem got that update, that updated software from the  
12 cable company, from the ISP, then it wouldn't be running  
13 Sigma anymore, it would be running that product and all  
14 of a sudden it wouldn't be able to get free access on  
15 the network.

16 So Mr. Harris programmed into his product  
17 something that would block those updates from actually  
18 working on his modified modems. And again you heard  
19 testimony from Mr. Broadfuerhrer that there was no  
20 reason to be blocking these updates unless you're  
21 stealing service and you wanted to continue doing it.  
22 So those are the features of Mr. Harris's products.

23 And Mr. Harris made it crystal clear what these  
24 products were designed for in a chat that he had with  
25 Mr. Phillips about the customer who wanted to buy 10,000



1 copies of his software, and that chat is Exhibit 5,  
2 specifically it's on Page 14, it's on your monitors  
3 right now, and I want to read that to you.

4 Mr. Phillips, who is in the nonhighlighted text,  
5 says: "How much do you want to sell Sigma licenses for  
6 in mass volume, 10k, 10,000, SB-3100? They want to use  
7 these to steal service. We have to show them how to  
8 steal service, too." How does Ryan Harris respond? He  
9 says, "\$2 apiece, 20k, 20,000 U.S. dollars sounds good  
10 to me." Phillips says, "Okay." Harris goes on to say,  
11 "For 20,000 -- for 20k, man, I'll give them unlimited  
12 licenses."

13 So Craig Phillips is telling Ryan Harris right  
14 there "These people want to buy 10,000 copies of our  
15 software, we've got to teach them how to use it to  
16 steal," and Ryan Harris doesn't blink. He's happy to  
17 help people steal service from internet service  
18 providers and he's particularly happy to do it if he can  
19 make money in the process.

20 Another way that you know that Ryan Harris was  
21 running a fraud scheme here is what Ms. Sedky described  
22 in her opening as the "cat-and-mouse game" that he was  
23 playing with his ISPs and with the modem manufacturers.  
24 Not only did he initially design his products to steal  
25 service, but Isabella Lindquist told you that he would

1 regularly tell her what the ISPs were doing to try to  
2 block the TCNISO users from stealing service and he  
3 would ask her to devise work-arounds, ways to get around  
4 those blocks so that people could continue to use his  
5 products. And that, she said, was a major part of her  
6 job. In fact, she told you that the updates to the  
7 Sigma program -- and you heard about Sigma 1.3, 1.4,  
8 1.5, those were primarily new versions of the program  
9 that contained these work-arounds, so that people could  
10 continue to steal service with their modems from their  
11 ISPs.

12 Mr. Kohler and Mr. Brodfuehrer told you that these  
13 TCNISO work-arounds were very effective, that Motorola  
14 and Charter both kept adding new security features to  
15 the modems, to their networks, and then these security  
16 features often worked for a time, they would block, um,  
17 sometimes the TCNISO modems from getting on, but then  
18 TCNISO would come up with a work-around that allowed the  
19 users to get back on, to continue to get the free  
20 internet service and to get around these security  
21 measures. So you've got the design of the products and  
22 you've got the regular modifications of them all proving  
23 that this was a fraud scheme.

24 You also know it's a fraud scheme because  
25 Mr. Harris himself and his customers did, in fact, use

1 the TCNISO modems for the intended purpose, which was  
2 stealing internet service. Craig Phillips testified  
3 that he and Ryan Harris used a modified modem in the  
4 apartment they shared together to get free, unpaid,  
5 uncapped service and that the service that they got was  
6 10 times faster than the paid service. In fact, he told  
7 you that he remembers Ryan Harris saying to him, "You  
8 know, why are you paying for service? We've got an  
9 uncapped modem here."

10 So that's Phillips's testimony, but you also saw  
11 Ryan Harris's own words. You saw a chat in which he  
12 talked about the fact that he loved Sigma because of its  
13 speed, um, and not only did he say in his chats that he  
14 liked using it, you've got Exhibit 17, Page 3, in front  
15 of you where he talks to someone named Mr. T about the  
16 fact that he knows his customers were using his  
17 products, too.

18 I'm going to actually just see if I can get rid of  
19 that red arrow.

20 (Makes adjustment.)

21 THE COURT: I've got it.

22 MR. BOOKBINDER: Thank you, your Honor.

23 So in this chat, um, Mr. T says, "Well" -- or  
24 asks, "Well, I mean, is Sigma working 100 percent with  
25 all ISPs?" And what does Harris say in response?

1 "Everyone except Adelphia, yes, and maybe one in  
2 Australia." "Okay. Cool. What are those ISPs doing?"  
3 "Something with the modem cert. We will have it cracked  
4 soon."

5 So, first of all, Harris there is saying, as far  
6 as he knows, his products are working fine, every ISP,  
7 except for one, and that's Adelphia, and second of all,  
8 the one that they're not working on, he's trying hard to  
9 crack that, too. And if you had any question about  
10 whether this was stealing service or not, he's talking  
11 about "cracking the modem cert thing" that Adelphia's  
12 doing, and you heard Mr. Russell talk about "the modem  
13 cert," which stands for "certificate," was one piece of  
14 the cert security feature that the ISPs could put in  
15 place. So the only ISP that's successfully allowed to  
16 block him, successfully able to block him, at that point  
17 he's working on cracking that and getting around it.

18 In addition to hearing Ryan Harris's own words,  
19 you heard from three Massachusetts users who came in  
20 here and told you, they admitted to you that they used  
21 his modems to steal service. You heard from Mr. Larosa  
22 who told you that he bought a series of modified modems  
23 that he sniffed for MAC addresses, one of a friend's  
24 house, I think he said he was from Mattapan, he went to  
25 Roxbury, he sniffed for MAC addresses there, took them

1 back to his house, and he used them on his modems to  
2 steal service for about two years. And that he bought  
3 dozens more modems, some for himself, to sort of upgrade  
4 his product over time, but primarily he resold them to a  
5 friend. That was Mr. Larosa.

6 Mr. Madeira, you heard he said he was a paying  
7 Comcast customer, he was paying for service the whole  
8 time, but he bought a TCNISO modem because he wanted  
9 uncapped, faster service without paying for it. So he  
10 bought a modem and he hoped that that modem was going to  
11 be faster than his Comcast modem, but it turned out it  
12 was about the same speed -- he told you he never changed  
13 the configuration file, he didn't do anything to the MAC  
14 address, so that may be why it was the same speed, but  
15 then he told you what he did was he used both the  
16 Comcast modem and the TCNISO modem at the same time.  
17 Each of them was getting, I think he said, 8 megabytes  
18 per second of bandwidth, and combined -- and he knew  
19 something about computers, he was able to combine them  
20 together, and then he got 16 megabits at once on his one  
21 computer. So he used them together and he got twice as  
22 much service as he was paying for and he did that  
23 without paying anything extra. It only worked for about  
24 a month and a half before his modified TCNISO modem  
25 stopped working, but he was able to get that service.

1           And then you heard from Nathan Hanshaw, finally.  
2           He told you he initially downloaded a free version of  
3           Sigma 1.3 from Harris's website and he got later  
4           versions from the website using keys that Chris Watts,  
5           one of Harris's programmers, gave him. And he told you  
6           that he used that software on his modems, that he was  
7           able to steal service and uncap his modems for years,  
8           and that his service was about ten times faster with the  
9           hacked modem. So you know, from that testimony, that  
10          the users were actually using these products to steal.

11          In addition to the evidence that people were  
12          really using this stuff to steal service, you heard that  
13          Ryan Harris hosted forums on his website, TCNISO.net,  
14          and that he and his customers used those forums to swap  
15          MAC addresses. You may remember the testimony that, um,  
16          if you want to use someone else's MAC address, it needs  
17          to be from outside your local area, and so people  
18          swapped with others.

19          Take a look at Exhibit 22, Page 2, it's up on your  
20          screen right now, and this is a post on one of the  
21          website forums by DerEngel, and that's him, and he  
22          says: "I'm checking up on something for a friend. Does  
23          anyone have any verified MAC addresses and/or config  
24          files for Phoenix, AZ? If sensitive, just PM me.  
25          Rewards will follow."

1           So he's offering rewards in exchange for a  
2       verified MAC address. And Special Agent Russell  
3       testified that his experience is that a verified MAC  
4       address is one that's actually been determined to work  
5       on a certain ISP.

6           So you've got Harris's own statement, he's looking  
7       to trade MAC addresses on his forums, and you've also  
8       got Craig Phillips and Nathan Hanshaw, and they told you  
9       that each of them used the forums on the website to  
10      trade MAC addresses with people and then they used those  
11      MACs to steal service.

12          There's also the evidence that Harris was trying  
13      to keep himself hidden throughout this enterprise, which  
14      shows that this was a fraud scheme and not some kind of  
15      an innocent business that he was are running. And I  
16      wanted you to take a look at Exhibit 21, Page 5, this is  
17      another one of these chats, and this is Ryan Harris  
18      again here saying: "I'm a professional hacker. It's  
19      what I do for a living. It's what pays my bills. I get  
20      paranoid just to check who's at my front door." He's  
21      describing himself as paranoid. He's afraid to open his  
22      front door. It shows that he's worried, he's worried  
23      about what he's doing.

24          Ms. Lindquist told you that she worked with Ryan  
25      Harris for a year, talking to him or chatting with him

1 almost every day, and in that whole time he only  
2 referred to himself, he only told her his name was  
3 "DerEngel," he never gave her his real name. He knew  
4 her real name, he knew where she lived, but he wouldn't  
5 tell her anything about himself. He only uses the name  
6 "DerEngel," you heard, on the website. Special Agent  
7 Russell testified to you that he never saw the name  
8 "Ryan Harris." And in his posts, again, only  
9 "DerEngel."

10 Then there's the book that you saw, it's going to  
11 be in evidence, it's Exhibit 7. That book, again, Ryan  
12 Harris wrote under the name "DerEngel," and in his book  
13 he says that he writes software code, does hacking, from  
14 his "clandestine residence in Hong Kong."

15 He wrote that book under the name of "DerEngel."  
16 Now, Mr. McGinty, in his opening statement, made a big  
17 deal about the fact that Harris's name actually does  
18 appear somewhere in the book, and so we showed you that  
19 when we went through the book with Special Agent Russell  
20 and it is in there, it's in tiny little type on one of  
21 the inside pages after the copyright information. But  
22 it's not clear that Mr. Harris is the author of the book  
23 from that. And, um, Mr. McGinty also pointed out to  
24 you, in his opening, that Ryan Harris's photo is in the  
25 book and, again, if you take a look at the book, you'll



1     see that that is true, it is there, but there's no  
2     caption under it that says "This is Ryan Harris." So  
3     the photo isn't any good to anybody who doesn't already  
4     recognize him, otherwise no one knows who that is, who's  
5     in that photo.

6             So all this evidence that I've been talking about  
7     so far proves that Harris devised and then participated  
8     in a scheme to defraud the internet service providers,  
9     specifically to steal internet service.

10            And as I mentioned earlier, there were three  
11     reasons why Harris came up with this scheme. You heard  
12     about these all during the past week. First, he wanted  
13     free super fast internet service for himself, and you  
14     heard that he got it. Second, he wanted to make money  
15     selling his theft kit to other people. And you read  
16     chats where he talked about how much money he was  
17     making, "15k a month, no advertising, this was great,"  
18     he talked about how much he wanted to make, he wanted to  
19     buy a house, he wanted to become a millionaire. And you  
20     saw, in the PayPal record that went into evidence, that  
21     he made almost \$800,000, brought in almost \$800,000  
22     through PayPal alone. You heard evidence that PayPal  
23     wasn't the only way people could pay for things, people  
24     used credit cards, in fact, Special Agent Russell did  
25     when he bought his book, and that's not included in that

1     \$800,000 PayPal figure. So that was the second reason  
2     why Mr. Harris wanted to set up and run this scheme.

3             And the third is that he wanted to punish the ISPs  
4     for charging for internet service because he thought  
5     that ought to be free. And you read some excerpts from  
6     the book about this. I want to show you two of them  
7     right now. This is from Exhibit 7, the first one is  
8     Page 3. It says: "This book is dedicated to all the  
9     righteous hackers that have been silenced by the greedy  
10    corporations." And then the second one is Page 12. And  
11    here it says: "My goal is clear. I wanted to uncap as  
12    many cable modems as possible. The war had begun."

13            So you know a lot about this scheme, that's the  
14    bulk of the first element of wire fraud, the second  
15    portion is that it involved a material  
16    misrepresentation, and we can talk about this for a  
17    minute.

18            I suggest to you that the evidence of a material  
19    misrepresentation in this case is fairly  
20    straightforward. Mr. Kohler and Mr. Brodfuehrer both  
21    told you that ISPs rely on the MAC address of the modem  
22    to verify that someone is a paying subscriber on their  
23    network and they do that before providing internet  
24    service to that person. So when Harris and his users  
25    changed their MAC address to one that they've swapped or

1       stolen, they were representing to the ISP that they were  
2       the person to whom that MAC address really belonged. So  
3       -- excuse me. So in doing that they were  
4       misrepresenting their identity and the ISPs relied on  
5       this misrepresentation and provided them service. That  
6       means that this mattered to the ISPs, which means it was  
7       material.

8               Thank you.

9               (Takes drink.)

10              MR. BOOKBINDER: Let's see if I can keep my  
11       voice through the rest of this.

12              All right. So that's the material  
13       misrepresentation.

14              The next element is the willful participation,  
15       Ryan Harris's willful participation in this scheme with  
16       the intent to defraud.

17              So there's not much question here about whether  
18       Mr. Harris participated in this scheme. I mean, it was  
19       his scheme. He came up with it. Exhibit 18, another  
20       one of his chats, Page 1, he says: "I created the  
21       entire cable modem hacking scene." You saw another chat  
22       where he says: "I am the creator." This is his, this  
23       is his thing.

24              He controlled TCNISO, its products, its website,  
25       its bank account. The evidence is clear that he

1 willfully participated in this scheme and the evidence  
2 also proves that he did that with the intent to  
3 defraud. You heard that he designed these products to  
4 steal service, that he modified them so the ISPs  
5 couldn't prevent this theft of service, and that he used  
6 them himself to steal service.

7 And the evidence also showed you that it was  
8 really important to Ryan Harris that these products  
9 worked because if they didn't work, he wouldn't sell any  
10 more, he wouldn't make money, he wouldn't be able to  
11 damage the cable companies. So, for example, he was  
12 willing to teach the person who was looking to buy those  
13 10,000 copies how to steal service and he taught other  
14 people how to use his products through the tutorials and  
15 the videos that he put on his website.

16 All of this evidence proves that he willfully  
17 participated in the scheme with the intent to defraud  
18 the ISPs. So let me move on to the final element and  
19 that is the interstate wire communication.

20 Now, you may be thinking about a wire  
21 communication as like a bank wire, you know, "I'm wiring  
22 money from one bank to another," but I expect that the  
23 judge will instruct you that internet communications can  
24 also be wire communications, that the wire doesn't have  
25 to be fraudulent in and of itself, there's not anything

1 fraudulent about the particular wire, that Ryan Harris  
2 doesn't have to be the one actually making the wire, and  
3 that he doesn't have to know the particulars about it,  
4 who was going to do this wire communication, when were  
5 they going to do it, it just has to be reasonably  
6 foreseeable to him, this type of wire, and it has to be  
7 in furtherance of the scheme.

8 I'm going to talk to you about each of the counts  
9 individually and how the evidence fits this element, but  
10 I want to first point out the stipulation that the judge  
11 read to you before I started, which was that the TCNISO  
12 website was hosted outside of Massachusetts. That  
13 means, I suggest to you, that if someone accessed that  
14 website from within Massachusetts, that there was  
15 necessarily an interstate wire communication of some  
16 kind involved in that access.

17 I want to show you now -- to talk about the  
18 specific counts, I want to show you a chart, and this is  
19 -- the information on this chart comes from -- I'll move  
20 it over here. (Moves chart.) Okay. So the information  
21 on this chart comes from the indictment, which you'll  
22 have back with you in the jury room. So if you miss  
23 something or it's a little hard for you to see, you're  
24 going to have this with you, um, when you make these --  
25 you're going to have the indictment with you back in the

1 jury room. But I want to talk about each of these wires  
2 specifically and how they relate to the different  
3 counts.

4 So Count 1 charges that in approximately 2005 it  
5 starts talking about "NH" -- and you'll see that in this  
6 -- in the indictment and on the chart it refers to these  
7 users by their initials, but you heard from Nathan  
8 Hanshaw, and Nathan Hanshaw is the "NH" referred to in  
9 this count, and the count charges that the wire  
10 transmission is: "NH accessed the internet from  
11 Massachusetts and downloaded Harris's Sigma cable modem  
12 hacking product."

13 You heard from several different witnesses that,  
14 um, Mr. Harris made Sigma 1.3 available for free on his  
15 website and, um, Mr. Hanshaw told you this was the first  
16 version that he downloaded. So he's downloading this  
17 from the TCNISO website and when you're thinking about,  
18 um -- so that's the interstate wire portion, being  
19 downloaded from that website, and when thinking about  
20 whether this wire would be reasonably foreseeable to  
21 Mr. Harris? I ask you to use your common sense here.  
22 If you make software available on a website, is it  
23 foreseeable that someone would download it? I would  
24 suggest to you that it is.

25 So the next question is, is this wire, this

1 download, in furtherance of Mr. Harris's scheme to  
2 defraud the ISPs? The more people that he gets to use  
3 his products and to use them to steal internet access,  
4 the more he gets to punish the ISPs, and that was one of  
5 his goals. So these downloads -- this download would be  
6 in furtherance of the scheme. And I suggest to you that  
7 it doesn't matter, considering this count, whether at  
8 some point, as you've heard, Mr. Harris and Nathan  
9 Hanshaw had a feud or stopped getting along. There's no  
10 question that relationship was volatile. But, um,  
11 Mr. Harris was in a war with the cable companies, you  
12 saw that excerpt from the book, and in this war, every  
13 user, everybody who downloaded one of his products was  
14 one of his soldiers, and I suggest to you that Nathan  
15 Hanshaw, like him or not, and certainly by the end of  
16 their relationship they didn't like each other, but that  
17 Nathan Hanshaw was one of Mr. Harris's soldiers when he  
18 used that software to steal internet access.

19 Count 2, again, is, this time it's 2007, and again  
20 it's Nathan Hanshaw accessed the internet from  
21 Massachusetts where he downloaded Harris's Sigma X cable  
22 modem hacking product, a later generation. Again,  
23 you've got the download, Mr. Hanshaw told you that he  
24 downloaded Sigma X from the website, again, but this  
25 time it wasn't a free product, he didn't pay for it, he

1 was able to download it because he got a key, you know,  
2 a combination essentially, from one of Harris's  
3 programmers, someone named Chris Watts.

4 So you've got a download again from the website,  
5 um, just like a paying customer would, and again that is  
6 foreseeable that if you put products up on your website,  
7 that people are going to download them.

8 Counts 3 and 4. There are specific dates here,  
9 January 15th, 2007 and December 5th of the same year,  
10 and the first one charges that: "Nathan Hanshaw  
11 accessed the internet from Massachusetts using Harris's  
12 products and a cloned MAC address and participated in an  
13 on-line chat discussing his hacking activities." And  
14 the second one is the same description, but a different  
15 date.

16 Now, you heard, first of all, from Nathan Hanshaw  
17 that he used the products, he used cloned MAC addresses,  
18 and he accessed the internet that way. The specific  
19 dates in these specific chats are based on two exhibits  
20 that you saw, they were Exhibit 11 and Exhibit 12, and  
21 those were just one page of logs that Nathan Hanshaw  
22 said were logs of his chats with someone named Brad  
23 Dennis. And in using various user names, both he and  
24 Mr. Dennis, but that's what Mr. Hanshaw said these  
25 things were, and he told you that Mr. Dennis lived in



1 Washington state. So again you've got them chatting  
2 over the internet, it's an internet communication with  
3 someone who lived outside of Massachusetts, that's the  
4 interstate wire, and, um, as to the question of whether  
5 this would be foreseeable? Well, Mr. Harris, when he  
6 made, distributed products that let people steal  
7 internet access, I suggest to you that it's not only  
8 foreseeable, it's almost a certainty that people are  
9 going to use those products to access the internet, and  
10 that's what Nathan Hanshaw did, that was the purpose of  
11 those products.

12 Count 5, um, June of 2008, and this time we've got  
13 "JL," Jose Larosa, "accessed Harris's TCNISO website  
14 from Massachusetts and bought a modified cable modem and  
15 ancillary products." Again, you've got him accessing  
16 the website out of Massachusetts, and there's your  
17 interstate wire, and is it foreseeable? Well, if you  
18 put a website up and you sell things on it, the purpose  
19 is for people to access it, and that's what Mr. Larosa  
20 did. That's Count 5.

21 Count 6. Um, "Mr. Larosa accessed the internet  
22 from Massachusetts using Harris's products and cloned a  
23 MAC address and obtained free internet access." So  
24 again it's obviously foreseeable that if someone buys  
25 one of these hacked modems, he's going to use it. Once

1 again internet access. Um, on the question of whether  
2 that internet use was interstate, did Mr. Larosa do  
3 anything with his modem that required interstate wires?  
4 Well, you may remember he told you that -- well, a  
5 couple of things. First of all, that he bought -- after  
6 he bought his first set of products, he went back to the  
7 website, the TCNISO website, and he bought more  
8 products, and that website's outside of Massachusetts.  
9 So when he went back there to repeatedly order products,  
10 those are interstate wires. And he also told you that  
11 he had some e-mail back and forth communication with  
12 somebody at TCNISO because one of the batches of modems  
13 he bought, um, he told you only five of them worked and  
14 five didn't, and so he wanted to return them and then he  
15 got an e-mail in response saying, "You don't have to  
16 return them, but you can fix them," e-mails back and  
17 forth with either Mr. Harris or someone else at TCNISO,  
18 and you heard a stipulation yesterday that the company  
19 was located in San Diego, California. So again those  
20 are interstate wires, and that is Count 6.

21 Count 7, is "WM," William Madeira, "accessed the  
22 website and bought a modified modem and ancillary  
23 products." It's just the same as Count 5 with  
24 Mr. Larosa, you've got someone using or accessing an out  
25 of state website, buying products, and that's what the

1 website was there for.

2 And then there's Count 8, which is "Mr. Madeira  
3 accessed the internet from Massachusetts using these  
4 products and obtained free internet access."

5 Now, Mr. Madeira testified that his situation was  
6 a little different, he connected his modified TCNISO  
7 modem and, um, he said, um, initially it didn't work, so  
8 he had to go back to the TCNISO website and get  
9 directions about, um, how to -- how to work it, um, and  
10 then after he did that he was able to then get internet  
11 service but he did not, um, register his MAC address  
12 with the ISP, he, um, simply started using it and it  
13 worked. He started using the MAC address, for some  
14 reason his ISP recognized him, or recognized the MAC  
15 address and gave him service, um, and he got that faster  
16 service that he paid for, and then, um, he -- you know,  
17 by going back and forth with the website, those were  
18 interstate wires in furtherance of the scheme.

19 So those are the counts that you're going to be  
20 specifically asked to deliberate about. And I'm going  
21 to put this chart down. And I want to talk for a minute  
22 now -- since we're on the topic of Mr. Madeira, I want  
23 to talk a little bit about some of these witnesses who  
24 testified during the course of the trial.

25 As you know from their testimony, some of them did

1     some pretty bad things. Mr. Madeira told you that he  
2     stole identity information while he was working for John  
3     Hancock as a temporary employee. You heard from Craig  
4     Phillips, he's got a felony conviction arising from his  
5     work with Ryan Harris on TCNISO. You heard from Nathan  
6     Hanshaw, he was a pretty nasty hacker doing all kinds of  
7     things, including swatting, some things that were pretty  
8     dangerous. Even Isabella Lindquist, um, was involved in  
9     this scheme to help people steal service. But the  
10    reason that we called these people as witnesses in this  
11    case is those are the people that Mr. Harris worked with  
12    and those are the people who were his customers and  
13    that's why they're the ones who had to come in here and  
14    tell you how this thing worked and how these products  
15    worked. If you think about it, if you're going to run a  
16    scheme to create a theft kit, it's not surprising that  
17    the people you're going to work with and the people who  
18    are going to buy it are thieves.

19           I expect that the judge is going to instruct you  
20    that you should consider these people's testimony with  
21    care, um, special care, and you certainly should, um,  
22    particularly Mr. Phillips because, as you know, he is  
23    hoping to get some benefit, when it comes to his  
24    sentencing, in return for his cooperation. But when you  
25    think about Mr. Phillips's testimony, you'll see that

1 all of the significant things that he testified to are  
2 corroborated by other evidence. You don't have to just  
3 rely on his words alone. The testimony of other people,  
4 like Isabella Lindquist, for example, about how the  
5 company worked, about the conversations they each had  
6 with Ryan Harris, and, um, Harris's own words in the  
7 chats with Phillips -- and there were a lot of those in  
8 Exhibit 5, um, his own words in those chats and in his  
9 posts and in chats with other people.

10 Now, as to Ms. Lindquist and as to the  
11 Massachusetts users, I ask you, when thinking about  
12 their testimony, to consider the fact that they told you  
13 they aren't hoping to get anything from the government  
14 in return for their testimony, so think about whether  
15 they have any incentive to make anything up to try to  
16 curry favor. Nathan Hanshaw already served his  
17 sentence, so his cooperation can't help him.

18 Ms. Lindquist and Mr. Larosa and Mr. Madeira, um, they  
19 have immunity, so their testimony can't be used against  
20 them in any way unless they lie. So what incentive do  
21 they have to try to curry favor? And why would these  
22 people tell you that they stole internet service, why  
23 would they come in here and say that, why would they  
24 make that up if it wasn't true?

25 Before I wrap up, I want to, um, touch briefly on

1     some of the arguments that Mr. McGinty made in his  
2     opening and some of the things that he raised through  
3     his questioning of the witnesses and those essentially  
4     boil down to two main points. The first, ISPs are bad.  
5     And the second one, Harris's products are good. The  
6     problem with these arguments is that the first one is  
7     irrelevant and the second one is refuted by the evidence  
8     you've heard during the course of this case. Let me  
9     start with the ISPs.

10           Mr. McGinty has presented you with a laundry list  
11     of what he views as the ISP's sins. Um, they limit the  
12     potential of modems. They don't let users have  
13     control. They impose filters on the modems. Et  
14     cetera. Et cetera. I suggest to you that all of that  
15     is irrelevant here. It doesn't give Mr. Harris or  
16     anybody else an excuse to steal service. You can't  
17     defraud a victim you don't like, it's still fraud if you  
18     do it. All right?

19           As to the products, Mr. McGinty is suggesting to  
20     you that there's no fraud scheme here because these  
21     products had other uses, they were designed for things  
22     not for theft of service. Well, what you've heard from  
23     him and what I suggest you're going to -- you may well  
24     hear in his closing is a lot of speculation about what  
25     these products could have been used for, what someone

1 might have used them for. You could have used them to  
2 open ports, you could have used them to be anonymous, to  
3 get the service you are actually paying for from the ISP  
4 and nothing more. But there's no evidence in this case  
5 that Mr. Harris intended the products for those purposes  
6 and there's no evidence that anyone actually used them  
7 for any of these purposes. And it's not just that these  
8 claims are not supported by the evidence, the evidence  
9 actually refutes them.

10 Mr. McGinty suggested to you that it might be the  
11 case that customers, for example, were paying for 1  
12 megabit per second of speed, but only getting half the  
13 megabit at some times, getting slower than what they  
14 paid for, and that maybe they uncapped their modems so  
15 that they could get that 1 megabit of service they were  
16 paying for and nothing more. Again, there's no evidence  
17 of this, this is speculation, and the testimony is  
18 actually the opposite.

19 You heard from Craig Phillips and you heard from  
20 Nathan Hanshaw that their TCNISO modified modems got  
21 service 10 times faster than what they had paid for.  
22 They didn't go from half a megabit to 1 megabit, they  
23 went from 3 megabits, Mr. Hanshaw testified, to 30, 10  
24 times faster. And Mr. Harris in his book talks about  
25 what he wants to do as "removing the cap altogether."

1 He's not talking about uncapping just so you can get the  
2 service you paid for.

3 Mr. McGinty has also suggested that people may  
4 have bought Mr. Harris's products so that they can be  
5 anonymous. Let me be clear here. The evidence you  
6 heard proves that changing your MAC address doesn't make  
7 you anonymous, being anonymous is what Mr. Harris did,  
8 for example, when he used the name "DerEngel," he used a  
9 made-up name so nobody knows who you are. Mr. Harris's  
10 products helped people steal the MAC addresses of real  
11 customers and impersonate those customers with the  
12 ISPs. That's not being anonymous, that's taking someone  
13 else's on-line identity.

14 You also heard from Special Agent Russell that  
15 there are a lot of ways to be anonymous on the internet  
16 for free. I mean, you could go to the library, you  
17 could go to Starbucks, you could go to a website like  
18 anonymizer.com. There's no need to buy a \$100 modified  
19 modem from TCNISO if all you want is to be anonymous.

20 Mr. McGinty's arguments boil down to speculation  
21 about possible noncriminal uses for Mr. Harris's  
22 products. I ask you to think about it this way. It's  
23 true that Mr. Harris's modems could have made great  
24 paperweights. Right there. (Points.) They're kind of  
25 heavy. You'll see one. They have rubber feet on the



1 bottom. They'll keep the papers from sliding around  
2 your desk. But use your common sense. Do you think  
3 anybody paid \$100 for a \$25 modem to use it as a  
4 paperweight?

5 The evidence you've heard during the past week  
6 proves that Ryan Harris designed TCNISO products for the  
7 purpose of stealing service outright and stealing  
8 premium service. Mr. Phillips told you this.

9 Ms. Lindquist told you this. Mr. Harris's own words in  
10 his chats tell you this. Mr. Kohler, Mr. Brodfuehrer,  
11 they told you that for all practical purposes these  
12 products had no other use other than theft of service.

13 So -- um, the evidence also proves to you that  
14 Mr. Harris, Mr. Phillips, and their customers used these  
15 software products and the modems in this way, in the  
16 designed and intended way to steal service, and in the  
17 end Mr. Harris was able to accomplish the goals that  
18 motivated him to embark in this scheme in the first  
19 place, he got free faster internet service for himself,  
20 he made a lot of money selling these products to people,  
21 and he was able to punish the cable companies. And by  
22 doing all of this he committed wire fraud, and we ask  
23 you to return a verdict of guilty on all eight counts.  
24 Thank you.

25 THE COURT: Okay.

1 Ladies and gentlemen, that concludes the first  
2 part of the government's closing argument. As I've  
3 said, I'll excuse you for lunch. We'll resume about 20  
4 after 1:00.

5 This instruction has to be getting harder to  
6 follow, but it's increasingly important that you do  
7 this. Continue to keep an open mind. Don't discuss the  
8 case. You still haven't heard all the arguments. Of  
9 course, you haven't heard my instructions that are going  
10 to, as I said, define the questions that you need to  
11 answer and the standards that you have to apply.

12 So you can talk about whether it was a good idea  
13 to ban beer from the Red Sox clubhouse. You can talk  
14 about whether we're finally going to get snow, which  
15 hopefully won't impede our progress this morning. But  
16 don't talk about the case. Pretty soon it will be time,  
17 I hope later this afternoon, but not yet.

18 The Court is in recess for the jury.

19 (Jury leaves, 12:40 p.m.)

20 THE COURT: All right. Is there anything  
21 further before we recess until 1:20?

22 MR. MCGINTY: No, your Honor.

23 THE COURT: All right. Then the Court is in  
24 recess.

25 (Lunch recess, 12:40 p.m.)

1 (Resumed, 1:20 p.m.)

2 THE COURT: All right. A couple of things.  
3 One, have you given Mr. Hohler the redacted indictment?  
4 I think he gave me one earlier this morning. I may have  
5 just stuck it --

6 MR. BOOKBINDER: Well, I have another copy  
7 here, your Honor.

8 THE COURT: Okay. We'll do that. And at the  
9 break we'll get about 20 --

10 MR. BOOKBINDER: Oh, it actually has writing  
11 on it.

12 THE COURT: Well, here's a -- no, I've written  
13 on mine as well.

14 MR. BOOKBINDER: Well, I can run and get one  
15 right now, your Honor, or I can get one during the  
16 break.

17 THE COURT: You don't need to do that. But  
18 we'll need to have it before we excuse the jury.

19 What's the next letter?

20 THE CLERK: H, Judge.

21 THE COURT: Okay. Mr. Hohler will give you  
22 the proposed verdict form, which I'll make Exhibit H.

23 (Exhibit H, marked.)

24 THE COURT: All right. Is there anything  
25 further before we proceed?

1           Is that a chart you want there?

2           MR. MCGINTY: Yes, it is.

3           THE COURT: What's it a chart of?

4           MR. MCGINTY: It's the counts.

5           THE COURT: Okay, the same one the government  
6 used?

7           MR. MCGINTY: Yes.

8           THE COURT: And it's just a duplicate of  
9 what's in indictment, is that correct?

10          MR. BOOKBINDER: Yes.

11          THE COURT: Is that correct?

12          MR. MCGINTY: Yes, that's correct, your Honor.

13          THE COURT: All right. We'll get the jury.

14          (Jury enters, 1:25 p.m.)

15          THE COURT: Ladies and gentlemen, we're ready  
16 to proceed to the defendant's closing argument.

17          MR. MCGINTY: Thank you, your Honor.

18

19 CLOSING ARGUMENT BY MR. MCGINTY:

20           May it please the Court, men and women of the  
21 jury. The government doesn't like the products that  
22 Mr. Harris made, but indignation is not the basis for a  
23 criminal charge, and what I'd like to do right now is  
24 just focus you momentarily on the charges that were  
25 brought and let's just go through these quickly.

1           There are four counts here of what remains of the  
2 indictment. Of those four counts, all of them pertain  
3 to a person named Nathan Hanshaw. Remember him? He's  
4 the guy that Ryan Harris would have nothing to do with,  
5 called an "idiot," didn't want Craig Phillips stealing  
6 from him. He's the guy that out of indignation at Ryan  
7 Harris had hacked into his website.

8           The allegation here is that Nathan Hanshaw had  
9 downloaded a Sigma 1.3, had -- we now know what he did  
10 on Count 2, he induced Isabella Lindquist to give him  
11 the raw code. In other words, he didn't buy anything.  
12 Actually, on Count 1 he didn't buy anything either. He  
13 didn't buy anything? He didn't buy anything because he  
14 duped Isabella Lindquist. And on the next two he used  
15 the internet and how do we know how he used the  
16 internet? Oh, that's right, he got hacked firmware from  
17 MACs fraud, remember, and he was also war driving. How  
18 is Harris, Ryan Harris, complicit in anything Nathan  
19 Hanshaw did? That's the first four charges that  
20 remain.

21           The next four relate to two people that Ryan  
22 Harris didn't know. How did Harris know how a  
23 particular device was going to be used? How did he  
24 know? Because the person communicated with him. Well,  
25 he didn't and he didn't.

1 (Points to people.)

2 MR. MCGINTY: And one more thing about this.  
3 Notice down here it says: "Mr. Madeira accessed the  
4 internet from Massachusetts using Harris's products and  
5 a cloned MAC." Well, we now know that Mr. Madeira never  
6 used a cloned MAC, Mr. Madeira took the device, plugged  
7 it in, and it worked. That was his testimony. Not that  
8 he did anything to alter it.

9 So if you look at what's here, wire fraud, and you  
10 try to figure out, okay, let's take the indignation and  
11 let fit it into the charge, let's make this intelligible  
12 as a charge that brings him into criminal court, and you  
13 know something? You're not going to see it here, and  
14 these are the charges you're deliberating on, and these  
15 are the ones, the only ones that are part of your  
16 deliberations in this case.

17 Now, the government's theory in this case is that  
18 his business was illegitimate, it was a one-trick pony,  
19 it did one thing, it stole service, and stealing service  
20 was set up all through the opening of the government and  
21 all through the closing of the government and stealing  
22 service was the act of getting from a coaxial cable,  
23 life, a coaxial cable that didn't have any life. Now,  
24 if you have -- and we went through this with  
25 Mr. Kohler. If you have a coaxial cable in your house

1 and it's not live, the magical products of TCNISO can't  
2 make it live. It can't do it.

3 So when the government talks about stealing  
4 service, where's the evidence of the stealing service?  
5 In Mr. Harris's book he talks about "uncapping," he is  
6 not talking about stealing service. His book will be in  
7 evidence and you can look through it, but you're not  
8 going to find it.

9 So what the government says to you is his business  
10 is illegitimate, there's no basis to have it, and  
11 everything he had was a theft device -- this stealing  
12 service, this making a coaxial cable live, when you  
13 haven't paid for any service and where it doesn't get  
14 connected to the cable company.

15 Fiction. It's a fiction. You've heard no  
16 evidence about that in this case. It's fiction. And  
17 the case is founded on fiction. And the one-trick pony  
18 is a fiction. How do we know that?

19 Yesterday, Agent Russell, on the stand, said there  
20 were reasons that a person would seek to be anonymous on  
21 the web. I didn't make this up in my opening  
22 statement. He said it, and he acknowledged it, and he  
23 said there are multiple ways you could do that, yes,  
24 including the TCNISO product. And he said it can be  
25 legitimate to be anonymous on the web. I think we all

1 know that. There are reasons why you want to have  
2 anonymity. It's nobody's business, not the government's  
3 business, not anybody else's. And if you're a political  
4 dissident, if you have a speech to make, but you'll pay  
5 a price for the consequences of that speech, then you  
6 want to have a way to get that speech and not have it  
7 get back to you in a way that could result in fatality  
8 or harm to you.

9 So when we've talked about anonymity as one of the  
10 things this does, I didn't say that in my opening --  
11 yes, I said it, but that's not the evidence. Agent  
12 Russell said it. And who else said it? Mr. Kohler.  
13 "Mr. Motorola" said the same thing.

14 Mr. Kohler also said, and agreed, that the cold  
15 hand of the cable company could reach down to your  
16 modem, in your house, and it can do things with your  
17 modem. It can change your filters. It can close  
18 ports. It can change your content. It changes your  
19 experience. It changes what you get. If you have P2P  
20 capability, then you want to be able to communicate,  
21 upload, and the cable companies -- not all of them, not  
22 all the time, but they overbook their service from time  
23 to time and sometimes they get in the business of  
24 throttling service because they don't want you to have  
25 certain things or they want to create a disincentive for



1     you having that. All of them? No. All of the time?  
2     No.

3             Harris's business wasn't about a particular cable  
4     company, it wasn't about constraining a particular cable  
5     company, and no it wasn't a war with the ISPs, it gave  
6     you, personally, you, the power to make the choice for  
7     yourself. And when Isabella Lindquist broke open the  
8     cable box, the cable modem, what she did is release the  
9     potential. Oh, yes, you can abuse it. You can abuse  
10    it. But she unleashed the potential of their products.  
11    Ryan Harris's products gave you the ability to make a  
12    choice. The government says, "Oh, but there was really  
13    only one choice, it was stealing service." Fiction.

14            What else we know about this is some of the  
15    people, Isabella Lindquist told you, were interested in  
16    this because they were geeks, they were just interested  
17    in finding out about how this stuff worked and they  
18    wanted to know what it was. They were among the  
19    customer base of TCNISO.

20            And what do we know about TCNISO? It ran a store,  
21    it sold the book, "Hacking the Cable Modem, What Cable  
22    Companies Don't Want You to know." I would almost say  
23    that the book could be written again and called,  
24    "Hacking the Cable Modem, what the Government Doesn't  
25    Want You to Know," because the government treats every

1 aspect of a cable modem as a closed system susceptible  
2 to only the control that the cable company places on it,  
3 and comes to you and accepts -- or asks you to accept  
4 that as the capability of the product. And it suggests  
5 that anyone who would open it up to release that  
6 potential is engaged in some kind of criminal endeavor.  
7 That's the government's theory.

8 But TCNISO had a store. It sold -- as it was  
9 described by the agent, it had various computer parts  
10 that it sold, it advertised itself as a personal  
11 computer-repair-type shop. On the website modems were  
12 for sale and among the modems that were for sale was a  
13 Motorola 5101, a stock Motorola modem. Not modified.  
14 Not hacked. You could buy that modem from TCNISO. You  
15 could buy the 4101, which was the engineering  
16 prototype. You could buy the 5100. You could buy each  
17 of those modems, not changed, not altered, available  
18 through TCNISO, and the price was better, more favorable  
19 than it was if you bought it from a -- from a place  
20 where you buy a cable modem, an electronics shop or  
21 something like that.

22 The government says that Harris sought anonymity,  
23 concealed who he was, and that the picture in the book,  
24 you shouldn't even look at it, because it really isn't  
25 clear it's him, and that when he put his name next to

1 the copyright on the book, um, he really wasn't  
2 acknowledging that he was "DerEngel," the person that  
3 wrote the book.

4 TCNISO had a bank account. Its monies were  
5 traceable. It publicly filed for incorporation with his  
6 name on it, Ryan Harris. If you wanted to find out what  
7 TCNISO was, there were articles of incorporation,  
8 Exhibit 1, you'll see it, with his name on it. Not much  
9 of a way to hide.

10 Now, none of this makes a difference to the  
11 government. What the government wants you to do is to  
12 infer from the nature of the object that anyone using it  
13 must have been using it for an impermissible purpose,  
14 and that's why they have say to you that all of the  
15 other capabilities of the product, all of the choices  
16 you could make with the product, just pretend they're  
17 not there, just kind of ignore those, because all of  
18 those introduce choice, all of those create the  
19 potential, and the government wants to treat those as if  
20 they're not here and want to suggest there was no  
21 evidence that support it. But I think you listened to  
22 the evidence and you know better.

23 The government's narrowed this case, all of it --  
24 well, actually not all of it, just 90 percent of it,  
25 came from people who had plea deals or immunity. Now,

1     imagine you're talking to a stranger about something  
2     that happened outside the courtroom and imagine if you  
3     were trying to figure out whether the person was telling  
4     the truth or not, how would you do it? Well, you'd try  
5     to talk to the person and get a sense of, you know, who  
6     they are and what it's all about.

7             Would it make any difference to you if you found  
8     out the person was being paid money to tell you the  
9     story they told you, would that be important to you?  
10    Presumably. Because if you thought the person was  
11    telling the truth and you found out someone paid them to  
12    tell you that, you'd go, "Come on."

13             (Indicates.)

14             MR. MCGINTY: What if you find out -- what if  
15    you find out the person is threatened with jail? What  
16    if you find out the person -- that the government has  
17    information about the person and gives them immunity?  
18    How do you evaluate that? I mean, if they give me  
19    immunity, I know what song I'm singing, I know what it's  
20    going to be, and in this case it's going to be, "Um, I  
21    know, Ryan Harris." Um, "Give me a second," "stealing  
22    service." I know how to say that and I didn't get  
23    immunity. But every one of us knows that if I give you  
24    immunity, you may not do it, because you may have a  
25    conscience, but if you get immunity, you're going to

1 thinking about it, "I know what I'm supposed to say."

2 So when the government gets up and says, "This is  
3 the narrative of what happened," I want you to think  
4 about the narrative because the narrative comes at a  
5 price, at a cost, and it's a cost because you're  
6 inducing somebody to say what you want them to say. And  
7 the cost isn't just that what the person says is  
8 probably not going to be reliable, the cost is your  
9 integrity, too, because if you bring in a witness and  
10 you deliver their testimony, and you pay for it, you pay  
11 for the immunity, it's not to be taken seriously. How  
12 could it be? In your own lives, you wouldn't do that.

13 But here, if you go through the list of the people  
14 that are in here, almost every single one of them,  
15 Phillips, even gentle Isabella Lindquist, Madeira,  
16 Larosa, every one of them steered -- how could they not  
17 be? -- steered to the narrative, the one-trick pony,  
18 "stealing service," "Ryan Harris." The whole narrative  
19 the government makes leans, it all leans in one  
20 direction. Why does it lean? Because its pushed. And  
21 how are you pushing it? You push it when you give an  
22 immunity letter to a guy.

23 Mr. Larosa, Mr. Madeira, by the way, they got  
24 immunity letters three weeks before they came in here.  
25 Three weeks before they came in here. Think about

1     that. Are you kidding me? What terrible secret did the  
2     person have to have with confidence that if it came out  
3     they'd be protected from revealing by giving them an  
4     immunity letter three weeks before they came in to  
5     testify? What's that all about? I don't know. And you  
6     don't either. But we know, when we hear from people  
7     like that, we know that what we're getting ain't the  
8     truth. We know there's something wrong. And we know  
9     that this entire case rests on a narrative that sits  
10    atop the immunity letter, the cooperation agreement,  
11    testimony that's bought, testimony that's paid for.

12           Now, the charges in this case that remain, as I've  
13    mentioned before, are wire fraud -- are wire fraud  
14    charges. Now, of these Craig Phillips pled guilty, but  
15    do you know something? He's supposed to be the partner  
16    of Ryan Harris. He didn't plead guilty to wire fraud.  
17    That's odd, isn't it, his partner, presumably? It  
18    wasn't wire fraud, it was computer fraud. It was  
19    something completely different.

20           Even Mr. Hanshaw, when he pled guilty, what he was  
21    pleading to -- well, he was pleading to a laundry list  
22    of very serious crimes, between his hacking and his  
23    swatting, he pled guilty to wire fraud and do you know  
24    what the wire fraud was? It was calling up schools,  
25    calling up the police department, it was calling in bomb

1 threats, and it was stealing people's credit  
2 information. Okay, wire fraud, I get it. I  
3 understand. How is the manufacturer, how is the  
4 preparer, how is the seller of a device that could be  
5 used in different ways and by different people, at their  
6 choice, at their election, based on what they wanted to  
7 do, how is that person pulled into a charge called "wire  
8 fraud"?

9 Well, Mr. Phillips, the government leaned on him  
10 and they promised him no jail, so Mr. Phillips wasn't  
11 about to fight the case. When he was first arrested, he  
12 said: "He left the company because of his dislike for  
13 Harris and that he needed a change of lifestyle." A  
14 short time later, once he realized what the script was,  
15 he began to say something very different, he talked  
16 about how he was afraid of getting caught. When he was  
17 first interviewed he never mentioned getting caught, he  
18 never mentioned a fear of getting caught, he never said  
19 he thought he did anything wrong. But later on the fear  
20 of getting caught became part of his theme and that's  
21 when he came in here and said, "I was afraid of getting  
22 caught because what we were doing we knew was wrong."

23 Now, why is he testifying that way and why isn't  
24 that what he said the first time that he was arrested,  
25 why isn't that what his narrative was from the start?

1 Because, you see, if you give a guy an incentive to tell  
2 you a story, he'll tell a story, and that's what Craig  
3 Phillips did.

4 Mr. Phillips told you he had chat logs. You know,  
5 he didn't tell the agents about that right away, he  
6 didn't say, you know, "I've got chat logs involving Ryan  
7 Harris." His testimony was he turned over the chat logs  
8 to his lawyers. But what's interesting about  
9 Mr. Phillips is he never turned over chat logs of  
10 himself, and what we learned from Mr. Hanshaw was that  
11 he and Mr. Phillips were in pretty steady  
12 communication. So what Phillips did is he took some  
13 chats involving Mr. Harris and he kept them for three  
14 and a half years. Where he kept them? What he did with  
15 them? Did he edit them? No one knows anything about  
16 it. But he kept them somewhere. And he produced them  
17 at a later date and they've been offered up to you. And  
18 when they're offered up to you, you need to keep in mind  
19 who had them, how long, and what were the circumstances  
20 of keeping them in the first place, what was it that  
21 Craig Phillips was trying to do?

22 Now, the government here has gone to great lengths  
23 to try to make Mr. Harris look bad. They culled out  
24 from certain of these chats, these purported chats,  
25 things that he said. Among them it talks about his role



1 in, um, inventing uncapping. But one of the chats they  
2 talk about is a chat relating to a possible hacker  
3 convention that was going to be held in Germany and the  
4 question is whether there would be a lot of licenses  
5 sold in connection with that hacking convention? And  
6 the government referred to this in their closing  
7 statement and said: "They were talking about teaching  
8 people how to get free service."

9 In the jury room you will have that entire chat  
10 and what you see as the chat develops is that when the  
11 conversation started with Mr. Phillips, Mr. Phillips  
12 said there was a group over in Germany, it was a hackers  
13 convention, "They want us to come over, all expenses  
14 paid," and Harris said -- he laughed and he said, "It's  
15 not for real." All of the conversation that happened  
16 after that was in the context of a proposal that Harris  
17 took not to be serious.

18 Now, the government plays that and all of it is  
19 intended to show, you know, that Harris is knowing what  
20 the product did and it shows him a little bit of a  
21 megalomaniac, a guy who hated the ISPs, a guy who was  
22 going to go to war with the ISPs, a guy that the ISPs  
23 were afraid of and were concerned about, who was doing  
24 damage to the ISPs, and the only problem with that is  
25 that the ISPs didn't seem to notice this. The cable

1 companies apparently didn't even know that Mr. Harris  
2 existed.

3 Now, Mr. Brodfuehrer came in and if you remember  
4 him, he was the person who didn't have outstanding tax  
5 warrants in the State of Indiana, he said that he had  
6 done testing on, um, a modem they got and testing to  
7 determine, um, what the nature of the modifications were  
8 that TCNISO had done, and he tried to remember when he  
9 had done it, it was either 2006 or 2007. Now, he didn't  
10 say 2004, he didn't say 2005, it was 2006 or 2007,  
11 almost up against the time that this investigation is  
12 done.

13 So the government said to him, "What have you  
14 got?" You know, "Give us the reports." And he said to  
15 the government, "I don't have any." And they said,  
16 "Well, give us the e-mail." I mean, "Give us the things  
17 that are shown in the investigation." "Show us the  
18 things that indicate that you cared about his product,  
19 looked at it, examined it to find out what it did  
20 relative to your capability." And instead,  
21 Mr. Brodfuehrer told them that he didn't have it, there  
22 was no test, no papers, no examination.

23 Motorola, apparently, if we understand this right,  
24 made a modem with a single means of customer  
25 authentication and that was the MAC address. Now, the

1     MAC address, as we now know, was on the box that the  
2     modem came in, it was on the bottom of the modem itself,  
3     and apparently was all over the internet. And, as we  
4     now know, the MAC address is to modems what our license  
5     plate is to our car or maybe our VIN number is to the  
6     car, in other words, yeah, it's an identifier, but it's  
7     an identifier that everybody knows about. So the cable  
8     company designed a modem which communicates with the  
9     cable office using only something that everyone knows,  
10    that's basically what we're told, and that was the  
11    single means of verification of that.

12           Now, the government, in its opening statement,  
13    suggested that getting a MAC is somehow illegitimate,  
14    that, you know, getting a MAC is a bad thing, and what  
15    they referred to it as was a "stolen account number."  
16    So at the beginning of the case the government says to  
17    you that what Harris did, the capability that he had in  
18    his product, permitted access to a stolen account  
19    number. But it turns out it wasn't a stolen account  
20    number. Perhaps we should have someone look at Google  
21    for its use of MACs in connection with its level of  
22    service and with every other company that uses MACs for  
23    internet service and for doing marketing. MACs are  
24    prevailing, they're available, they are in use.

25           In fact, Agent Russell talked about "sniffers"

1     that are commonly available, "Wire Shark" or "TCP Dunn,"  
2     which were different ways that MACs could be obtained  
3     using open source software, stuff that's out there, and  
4     you could get a MAC from that. It turns out that the  
5     capability of sniffing a MAC is generally available,  
6     it's open source, and as the agent said, "No, he's never  
7     started an investigation to determine whether Wire Shark  
8     had engaged in some kind of wire fraud."

9             When you consider all that we have learned, the  
10     little we have learned from Motorola and from Charter,  
11     there doesn't appear to be any response to anything that  
12     Mr. Harris did, there doesn't seem to be a concern about  
13     what he was doing or an identification of who it was who  
14     was using the product and what the extent of the impact  
15     was on Charter or even on Motorola in terms of its  
16     development of the modems.

17            Now, when you consider the charges here, the ones  
18     we pointed out earlier, all of them point to  
19     Massachusetts, all of them indicate there's a link to  
20     Massachusetts. That's what's alleged. And the reason  
21     for that link is that the government has to show that  
22     Mr. Harris's conduct was linked to Massachusetts, um, in  
23     order to establish venue here, in other words, the right  
24     to bring a charge in Massachusetts. I mean, you can't  
25     just haul him in here, you can't just bring a guy in

1 from California and pull him in here and have him answer  
2 to a charge here unless there's some legitimate basis, a  
3 count, a crime, something that makes it appropriate for  
4 him to be charged here.

5 So the government now, in its charges, says the  
6 connection between what Harris was doing in California  
7 and what he was doing here was the conduct of  
8 individuals in connection with the use of his product.  
9 Right? And the persons that we look to to get this  
10 connection, because otherwise -- and the judge is going  
11 to instruct you with respect to venue, but if you think  
12 that the use of Massachusetts was a jury-rigged way of  
13 pulling him into this court for charges in  
14 Massachusetts, then you acquit him, as he ought to be  
15 acquitted.

16 So in the charges here, we start with the first  
17 four, and let's go through them now in a little bit more  
18 detail. These all rest on the accusations of Nathan  
19 Hanshaw.

20 Nathan Hanshaw has a plea deal. Forget the plea  
21 deal, you can look at it and see him. The measure of  
22 Nathan Hanshaw is that he was a social engineer, he  
23 lived by deception. He penetrated into the inner  
24 sanctum of important corporations, into their  
25 confidential information, in order to steal. And how

1 did he do that? He did it because he's good. Nathan  
2 Hanshaw is a liar, he's a very good liar, and he's a  
3 skilled liar, and what he told you and admitted is he  
4 went to school on that, basically he would learn things  
5 so he could present himself in a way that would  
6 deceive. And that's what he did, and that's how he got  
7 into Motorola, and that's how he got into Charter, and  
8 that's how he got into Roadrunner, and that's how he got  
9 into all of the sites that he got into, to get  
10 information in order to steal, and that's quite apart  
11 from the other stuff he was doing, the vicious, vicious  
12 acts of calling in threats at schools, bomb threats.  
13 But what you know about him is he's a social engineer  
14 and social engineering is Counts 1, 2, 3 and 4. Social  
15 engineering.

16 He gets Sigma 1.3 and remember he couldn't  
17 remember what the product was, and do you remember he  
18 said, "I think so." Do you remember when he was  
19 testifying how some of the certainness of what you'd  
20 expect from testimony kind of slipped away because  
21 Hanshaw is a little bit on the elusive side of things.  
22 So he said, "Well, I got 1.3 from the website," and then  
23 later he said that he got every Sigma program from the  
24 developers. Well, which is it, did you get it from the  
25 website or did you get it from the developers?

1           And then he said, in Count 2, the Isabella  
2       Lindquist deceit, here he said that he had downloaded --  
3       I'm sorry, he didn't download this, he had gotten this  
4       from a different person, Christopher Watts, who had  
5       given him a key. Well, Christopher Watts is not TCNISO,  
6       Christopher Watts didn't sell it to him, Christopher  
7       Watts was doing something apart from anything TCNISO was  
8       doing, and that's if you believe that this represents  
9       the Christopher Watts activity, but if you believe it's  
10      the Isabella Lindquist lie, then what he did was he  
11      called Isabella Lindquist, convinced her that he had  
12      some of the code, the raw code.

13           Now why do you need raw code? I mean, if a  
14      product has the capability, then you don't need to know  
15      what its building blocks are, what its raw coding is.  
16      If you're getting the raw code on a program, it's  
17      because you've got something else in mind, and he did  
18      have other things in mind, but he doesn't tell you what  
19      they were. But he wanted the code. He didn't want the  
20      product.

21           He didn't use the product. How in the world are  
22      Count 3 and Count 4 talking about its use? He didn't  
23      use the product. He didn't want the product. He wanted  
24      the code. And he got parts of the code from somebody  
25      and then he went to Isabella Lindquist to try to

1 persuade her that because he had a substantial part of  
2 it, she should give him the rest, and said: "For a  
3 \$100, can you give me the rest?" And Isabella Lindquist  
4 did it, um, after she had left TCNISO, she did it while  
5 talking to him on a private chat between her and him,  
6 she agreed to pay -- or that she would give it to him in  
7 exchange for the \$100. What on earth does that have to  
8 do with Ryan Harris? I mean, come on.

9 So she gives Hanshaw the code and when he gets the  
10 code, what does he do with it? He stiffes her. He sends  
11 her a payment, withholds the cash on it, and she ends up  
12 getting nothing. The social engineer. The one who used  
13 the confidence he had, the sure hand he had, in deceit  
14 to get Isabella Lindquist to give up something that she  
15 didn't want to give up. What's that got to do with  
16 Mr. Harris?

17 Nathan Hanshaw. Nathan Hanshaw. Nathan Hanshaw.  
18 Nathan Hanshaw. (Indicates.) You don't need to give a  
19 verdict, you've got to be saying, "You've got to be  
20 kidding me? You've got to be kidding me?" And those  
21 are the four charges of the eight, those are four to get  
22 him here in Massachusetts.

23 Mr. Larosa. Mr. Larosa came in and testified that  
24 he never contacted Mr. Harris. No communication. What  
25 is the thing that Mr. Larosa was going to do with the



1 capability of the product that he bought? What was he  
2 going to do and how was he going to do it and what was  
3 he going to do it with? We don't have answers to any of  
4 that because there's no testimony about that.

5 So Mr. Larosa tries to get a product, the  
6 government says, "Well, you see, it doesn't really  
7 matter, you see, because it's the one-trick pony thing,  
8 if it's only good for one thing, then it doesn't matter  
9 how anybody would have used it." Well, here how did  
10 Mr. Larosa use it? Who did he use it with? We're told  
11 that Mr. Larosa was using the internet, he was WIFIng  
12 off his neighbor, but we don't know who the provider was  
13 for Mr. Larosa. And do you know what else?

14 Charter came in here and testified, do you  
15 remember, and do you know what Charter never said? It  
16 never said, "Do you know something? We looked at Nathan  
17 Hanshaw to find out what his use was and we have proof  
18 that he used our internet and this is how he did it."  
19 Not only that, but they never said that his address was  
20 served by Charter. The Charter guy came in and as far  
21 as he was concerned, you know, he had nothing to do with  
22 Mr. Hanshaw.

23 Well, what about Mr. Larosa? Who came in and  
24 said, "This guy got a thimble full" -- and maybe that's  
25 not the measure, "of broad band," "an iota," and maybe

1     that's not the one either, but anything of value that  
2     constituted -- what's the word? "Wire fraud." Not  
3     anything. Did any cable company come in and say there's  
4     any verification that Mr. Larosa got anything at any  
5     time from anybody? Nothing. Nothing.

6             So we have Mr. Madeira and we know that  
7     Mr. Madeira's testimony was that Mr. Madeira gets a  
8     product and he plugs it in. He doesn't change the MAC  
9     address. He doesn't try to get the configuration file.  
10    We know that he's a customer of somebody, but the  
11    somebody didn't come in to testify, so we don't know who  
12    the somebody is. He was paying for service and he  
13    testified that he thought his service increased when he  
14    plugged this thing in, but what he never told us is how  
15    did he plug it in to make a difference? Did he daisy-  
16    chain these things? Did he split them out? How did he  
17    get separate service? Did he take one off and put the  
18    other one on? We have no idea what he did. He said,  
19    "Well, I think we got more service." The government  
20    says, "8 plus 8, my God, so bring the cable company in."

21            If I use my gas service, I have a meter that says  
22    I used something, some thermal unit. Something. The  
23    cable company didn't come in and say to you that it's  
24    possible to measure that, it's not possible to measure  
25    that, or "Oh, by the way, we had a dead line going into

1     this apartment, he must have gotten it from somewhere  
2     else" or "We had a live wire that came in and this is  
3     what the capability was."

4             We don't know anything about this guy or this guy  
5     (Indicates.) What was their service? What were they  
6     getting? Who gave it to them? Did they use it? He's  
7     here because of this, "wire fraud." This is the whole  
8     thing. This is the whole case. So when you think about  
9     it, you say, "I know they're mad. They don't like us,"  
10    you sit here and you say, "I find it distasteful,  
11    dishonest, repugnant. I'm disgusted that somebody could  
12    create something that creates the capability that  
13    permits people to steal." Well, that's not what we're  
14    here for, we're here because something either is or is  
15    not a crime. And he --

16            Is there a crime that says that he hacked the  
17    modem? No. That he broke into the confidential  
18    copyrighted materials of Motorola? No. Is there  
19    anything that makes what he did a crime? No. We back-  
20    doored it to drag him here, to Massachusetts, for this  
21    or this (Indicates.) How about that? And we don't know  
22    that a nickel was lost by any cable company because no  
23    cable company came in and said, "I lost a nickel."

24            Isabella Lindquist came in and she got quiet and  
25    she testified about what she had done to create Sigma

1 and it turns out she's a remarkable young woman.

2 THE COURT: Mr. McGinty, you're going to have  
3 to keep your voice up.

4 MR. MCGINTY: Sorry.

5 She's a remarkable young woman. She has a  
6 fascination with identity software. Identity software,  
7 as I understand it, is the firmware that controls  
8 specific appliances for specific kinds of uses. It's a  
9 very idiosyncratic kind of expertise. And she took  
10 apart and created the capability, the MAC changer. She  
11 was here, Isabella Lindquist, she was on the stand.

12 If she was sitting there, would you convict  
13 Isabella Lindquist? Would you?

14 MR. BOOKBINDER: Objection.

15 THE COURT: Here, I can't hear what you're  
16 saying, which is part of the problem. So move the  
17 lectern back a little bit and --

18 (Moves lectern back.)

19 MR. MCGINTY: Isabella Lindquist talked about  
20 --

21 THE COURT: I'm sorry, I want to rule on the  
22 objection. The objection was to: "Isabella Lindquist  
23 was on the stand. If she was sitting there, would you  
24 convict Isabella Lindquist?"

25 Well, I'll instruct the jury on that later, how to

1 take into account the evidence regarding the other  
2 witnesses. So the objection is overruled. And I'll  
3 address it later.

4 MR. MCGINTY: When you look at the back of  
5 Harris's book, and you'll see his name in the book, and  
6 you'll see a picture of him, you know something? It  
7 really does look like him. And it also has his wife,  
8 who was then his fiance, her picture is there as well.  
9 Both of them.

10 In the book it says: "(1) the practice of  
11 modifying a cable modem violates service agreements."  
12 That makes sense, right? Service agreements are your  
13 beef with the cable company, whether it likes what you  
14 did or didn't do. And hackers risk being banned for  
15 life by service providers. This is all found in the  
16 back of the book, right? You're banned for life by the  
17 service provider who says, "You know something? You're  
18 my customer, and I don't like what you do," and you cut  
19 the guy off.

20 So messing with the cable companies, doing the  
21 things that the government finds so repugnant here,  
22 yeah, the cable companies can say, "I don't like that,"  
23 and they can cut off your service and send you back to  
24 the bad old days of dial-up. What is that, 26 or 58, 56  
25 or 20 -- or 28 and 56, waiting hours for your screen to

1     come on, that's where they can send you. Instead he  
2     faces inexplicable charges, unsupported by evidence,  
3     with the Massachusetts link to drag him here and make  
4     him answerable in this Commonwealth.

5             At the end of his book, Chapter 23, he had written  
6     about -- a chapter called "Securing the Future," and  
7     "Securing the Future" was the advice to cable companies  
8     about what they could do to address their security  
9     problems, because he was providing a function, including  
10    telling them what they can do to change things. In  
11    writing that book, he had a well-known publisher and the  
12    publisher has a little legend on there, it's called "The  
13    Best of Geek Entertainment," and they view themselves as  
14    providing expert analysis and information to the world  
15    of geeks, you know, people who like to pull things  
16    apart, people who may be different from you and me, but  
17    people who wanted to find out what makes things tick.  
18    And he wrote that book including telling the cable  
19    companies what they could do. What he didn't know was  
20    that writing that book would make him a target, it would  
21    elevate his profile, and would put him in the cross-  
22    hairs of accusation.

23            Now, a jury. A jury stands between an accusing  
24    government and an individual. You, as a jury, stand  
25    between an accusing government and Mr. Harris. Your

1 responsibility is to evaluate the evidence, your  
2 responsibility is to do justice, and it's to size up  
3 whether that government, in its effort to bring this  
4 criminal charge, had created -- or strike that, had  
5 overreached in a way that was intended to bring  
6 Mr. Harris to Massachusetts to answer for a charge for  
7 which there was no evidentiary support. Your job is to  
8 evaluate him, to listen to the evidence, yes, to  
9 evaluate the evidence, and then to do justice to ensure  
10 that your verdict does justice to Mr. Harris.

11 So I'm going to ask you to consider all that I've  
12 said here and think about it and evaluate whether under  
13 all those circumstances you ought not return a verdict  
14 of not guilty against Ryan Harris on all of the charges  
15 that the government has brought.

16 Thank you very much.

17 THE COURT: May I see counsel briefly at  
18 sidebar.

19  
20 AT THE SIDEBAR

21 THE COURT: All right. Before we go to the  
22 rebuttal, it may be prudent for me to give you this  
23 cautionary note.

24 Mr. McGinty said, a number of times, you know,  
25 what Mr. -- what Mr. Harris did was repugnant to the

1 government and I hope he's not going to provoke you into  
2 saying things that are impermissible, like that you or  
3 he are personalizing this too much. This is not a  
4 question of what Mr. Bookbinder or Ms. Sedky think about  
5 Mr. Harris, it's a question about whether he committed  
6 wire fraud. So that's not what this is about. So be  
7 sure to not be vouching for witnesses or saying what you  
8 do believe or don't believe. That's not what this is  
9 about.

10  
11 (In open court.)

12 THE COURT: As I said earlier, because the  
13 government has the burden of proof, it gets to argue  
14 first and then, relatively briefly, last.

15 Would the government like to offer a rebuttal?

16 MS. SEDKY: We would, your Honor.

17  
18 REBUTTAL ARGUMENT BY MS. SEDKY:

19 Good afternoon, again. Mr. McGinty said a lot of  
20 things to you in the last 45 minutes and I'd like to  
21 divide them into two.

22 First, he sort of attacked each of our  
23 Massachusetts users and talked about what we haven't  
24 proved about all of the nitty-gritty specifics about  
25 which ISPs that he used, and where did they live, and



1     what were their names, and what were the direct  
2     communications that they had with Mr. Harris. Well, the  
3     judge will instruct you about what you need to find  
4     beyond a reasonable doubt in order to convict Mr. Harris  
5     of wire fraud, and we expect that what the judge will  
6     instruct you is that Mr. Harris does not have to have  
7     any intent or any personalized --

8             MR. MCGINTY: Objection.

9             THE COURT: Overruled.

10            MS. SEDKY: -- any personalized knowledge  
11     about the specific wires alleged in each count. He  
12     doesn't have to know. He has to reasonably foresee that  
13     the wires -- not a specific wire, that the wires, as an  
14     instrumentality, will be used in furtherance of his  
15     fraud scheme. That is it.

16            So all of this -- all of -- you may remember in  
17     Mr. McGinty's opening he talked about "dissipating the  
18     mist," "getting rid of the noise," and really bearing  
19     down to the basics here. Well, let's do that, let's  
20     dissipate the mist and get rid of the noise and talk  
21     about what we actually will prove, have proven, and need  
22     to prove in order to convict Mr. Harris of these eight  
23     counts of wire fraud. And you will see that we do not  
24     have to prove that Mr. Harris committed the wires  
25     himself, that he was at the computer pushing the

1 buttons. That's not required. Someone else can push  
2 the buttons, cause the wire, and if it is reasonably  
3 foreseeable that the use of the wires as an  
4 instrumentality was part and parcel and in furtherance  
5 of his wire scheme, then you may convict him of  
6 committing wire fraud.

7 Now, Mr. McGinty talked a lot about the one-trick  
8 pony, the one-trick pony fiction, that this device that  
9 Mr. Harris devised actually has all of these benign  
10 uses, and I'd like to -- earlier in my opening I talked  
11 to you about what is this case not about, and I think I  
12 used a screwdriver analogy. And I said, "You know, this  
13 case is not about a guy who made a harmless device like  
14 a screwdriver and then found out later that some guy  
15 bought the screwdriver and used it to rob a bank." That  
16 is not what this case is about.

17 Now, Mr. McGinty has argued that that's what this  
18 case is about and this is all about -- about what does  
19 he call it? "product potential," "product capability,"  
20 and then those bad, bad users who are independently, on  
21 their own, taking control and using these for bad  
22 purposes. That's not what this case is about. This  
23 case is about intentional product design and intended  
24 use. These individuals, Nathan Hanshaw, Jose Larosa,  
25 William Madeira, they used these products exactly how

1 Mr. Harris wanted them to use it and intended them to  
2 use it, to steal service.

3 So let's talk about some of these phantom uses. A  
4 diagnostic tool. There's no evidence that a single  
5 purchaser of this theft kit used it as a diagnostic  
6 tool. There's no evidence of it. Not one user. 15,000  
7 product purchasers, 15,000 transactions, no evidence of  
8 a single one using it as a diagnostic tool.

9 MR. MCGINTY: Objection.

10 MS. SEDKY: And let's assume --

11 THE COURT: No, excuse me. I've got to rule  
12 on the objection.

13 MS. SEDKY: Sorry.

14 THE COURT: Ladies and gentlemen, you can --  
15 you have to understand two things I'm going to explain  
16 to you in detail again in my instructions. One, the  
17 defendant has no obligation to present any evidence, but  
18 you can consider, um, generally in the case all of the  
19 evidence that there is. But the defendant has no  
20 obligation to produce any evidence himself.

21 Go ahead.

22 MS. SEDKY: 15,000 users. Now, diagnostic  
23 tools, as you've heard, those are for ISPs to diagnose  
24 network problems. 15,000 IPSs? That doesn't make  
25 sense. Mr. Phillips testified that not a single user

1       bought this as a diagnostic tool. Not a single one.

2               What about a stock modems? "Oh, yeah, we're just  
3       selling stock modems." Mr. Phillips testified that to  
4       his knowledge not a single person purchased this as a  
5       stock, vanilla, garden-variety modem. It was a cover.  
6       They had them on the website to throw people off, to try  
7       to legitimize the public portion of their website. That  
8       is the evidence.

9               And what about CoaxThief, why do you need to sniff  
10       MAC addresses for a diagnostic tool? Why do you need to  
11       swap MAC addresses for a diagnostic tool? How does that  
12       help you diagnose network problems? How does that help  
13       you get rid of filters? How does that help you change  
14       your packet size? Let's look at this theft kit,  
15       CoaxThief, a MAC sniffer, MAC swapping on the website, a  
16       MAC changer, a config changer, you take them all  
17       together, they were all packaged in one kit. What's the  
18       reason? The experts told you, to steal service.

19               And even if there were some evidence that maybe  
20       there were, out of the 15,000 users, somebody who did  
21       use it to tinker with or diagnose their network  
22       problems, it doesn't matter. What matters is  
23       Mr. Harris's intent. Did that man participate in a  
24       scheme to defraud the cable company?

25               And let's talk about Isabella Lindquist. She's

1 the tinkerer. And what did she tell you? What did she  
2 tell you? Mr. Harris, back in 2002, when he first  
3 approached her, he asked her to do one thing for him,  
4 program a MAC changer. He didn't ask her to make him a  
5 diagnostic tool. And then he asked her -- he was  
6 breathing down her neck to create one work-around after  
7 another work-around after another work-around, not to  
8 add diagnostic functions so that all of these tinkerers  
9 and diagnosticians can use the product better, but to  
10 steal service, to defeat the ISPs' security measures.  
11 That's what was going on in Mr. Harris's mind.

12 And you saw his e-mail -- you saw his e-mail:  
13 "10,000 users, going to teach them how to steal  
14 service." That's what's going on in his mind. He's  
15 stealing service himself. He's bragging to his other  
16 people about having a 100 percent or almost 100 percent  
17 success rate, about cracking these security measures,  
18 that's what's going on in his mind.

19 And so this is not a diagnostic tool and it's not  
20 a geek tinkerer play-thing. That is not the evidence  
21 here. People were paying \$100 for a \$20 refurbished  
22 modem that had already been tinkered with, extensively.  
23 So if you're a tinkerer, why pay \$100 for a \$20 modem  
24 just to pull it apart? It makes no sense. And why do  
25 you need a MAC sniffer? Why do you need a MAC changer?

1       Why do you need a config changer? Why do you need a  
2       website dedicated to -- that has portions in it about  
3       changing or swapping people's MAC addresses? What in  
4       the world does that have to do with tinkering and play-  
5       things? Nothing.

6               Lindquist told you what this was about. He asked  
7       her to program a MAC changer. He directed her to create  
8       constant work-arounds, staying up all night working  
9       around the clock to work around the ISPs' security  
10      measures, because he was sharpening the tools in his  
11      tool kit, because he wanted them to work.

12             And this is not about freedom fighters. This is  
13      not about a privacy tool. It's a little ironic for me  
14      that someone who is now cloaking themselves in the veil  
15      of "privacy protector" devised a program that he called  
16      "CoaxThief" to let people eavesdrop on their neighbor's  
17      internet connection. That is an ironic use of the  
18      privacy connection here.

19             And this is not about 15,000 Rwandan or Egyptian  
20      freedom fighters who are out there trying to engage in  
21      political speech. As you heard from Mr. Russell, there  
22      are lots of much cheaper and easier and more convenient  
23      ways to get anonymous political speech. And, by the  
24      way, this wasn't anonymous, this was finger-pointing,  
25      this was blaming your neighbor or whoever's MAC address

1     it was across the town and pretending that they were  
2     you.

3             And Mr. McGinty has come up with a lot of -- a lot  
4     of potential, a lot of conceivable uses, if you really  
5     get creative and you really pick apart one little  
6     feature and another little feature and say, "This is  
7     benign," and "That's benign." Well, what we need to  
8     prove to you and what we believe the evidence has proven  
9     to you is that Ryan Harris, beyond a reasonable doubt,  
10    engaged in a scheme to defraud the cable companies and  
11    that the use of the wires was a reasonably foreseeable  
12    action in furtherance of that scheme.

13            Now, we don't have to prove that there was no  
14    conceivable doubt, that no matter how you twist and turn  
15    and look at the evidence there can be no possible doubt  
16    that somebody might use these products in a benign way  
17    or that Mr. Harris didn't have the intent to defraud the  
18    cable company, we have to prove beyond a reasonable  
19    doubt, that is the legal standard, and it is a high one,  
20    we are well aware of that, that it is a very serious  
21    burden, and we have met it.

22            In short, this case is not about screwdrivers and  
23    it's not about books, it's not about Mr. Harris's book,  
24    this is about a comprehensive soup-to-nut theft kit.  
25    It's got a screwdriver, it's got a schematic to the bank

1 -- to the inside of the bank in it, it's got a mask that  
2 you can wear, "Stealth Mode," to cloak yourself, it's  
3 got a code to disable the bank's security cameras, it's  
4 got a key to the front door, it's got a website that  
5 posts the bank combinations on it -- and, by the way, if  
6 the bank combinations change six months from now or a  
7 year from now, they're going to go to the website and  
8 update the bank combination to make sure that you go  
9 right back there and you get the brand new combination  
10 to walk right in that bank. That's what this case is  
11 about.

12 And I would submit to you that the government has  
13 proven beyond a reasonable doubt that by concocting this  
14 entire scheme to defraud the cable companies and using  
15 the wires in furtherance of those schemes and causing  
16 these eight wires to be transmitted in furtherance of  
17 his scheme, the defendant has committed wire fraud and  
18 is guilty of every one of those counts beyond a  
19 reasonable doubt.

20 Thank you.

21 THE COURT: Okay. Ladies and gentlemen, that  
22 concludes the closing arguments.

23 Based on what I've heard, I've got to do a little  
24 fine-tuning on the instructions and I said I would give  
25 you a break after the arguments, so we'll take about,



1 say, 15 minutes, to 1:45 -- oh, 2:45.

2 (Laughter.)

3 THE COURT: It's been a long day and night.  
4 Until 2:45.

5 So go back, continue to resist talking about the  
6 case and when you come back the instructions will be in  
7 three parts, one that relate to jurors in a criminal  
8 case generally, one on the questions that you need to  
9 focus on and the standards in answering them, and third,  
10 on the process of your deliberations.

11 So look out the window, see if it's snowing, but  
12 -- it is. But we'll get you out of here, um, today.  
13 But don't talk about the case yet. Okay?

14 The Court is in recess for the jury.

15 (Jury leaves, 2:30 p.m.)

16 THE COURT: Okay. Three things, quickly, I  
17 trust, about my instructions.

18 Mr. McGinty said I should instruct on venue.  
19 Actually I don't intend to do that because the  
20 conspiracy count is out. If they prove -- um, there  
21 would be venue for any of these counts if the wire came  
22 from Massachusetts, which is what's charged, and facts  
23 relating to venue only need to be proven by a  
24 preponderance of the evidence. We were talking about  
25 this, I think, back in December, that it would

1 hopelessly confuse things. But in order to find the  
2 defendant guilty beyond a reasonable doubt of any of  
3 these charges, they have find facts, as I understand it,  
4 that establish venue in Massachusetts, in the District  
5 of Massachusetts.

6 Second, I don't at present intend to give the  
7 consciousness of guilt instruction. You argued it, but,  
8 um, I've got enough other things to instruct on. And,  
9 um, I have added the following line to my instructions  
10 in response to the requests this morning by the  
11 defendant for a supplemental instruction. I propose to  
12 say:

13 "It would not be enough to prove wire fraud for  
14 the government to prove only that Harris sold one or  
15 more products that he knew would be used to commit a  
16 crime. However, the nature of any product sold and any  
17 knowledge Harris had as to how it would be used are  
18 evidence that you can consider, along with all the other  
19 evidence, in deciding whether the government has proven  
20 any or all of the wire charges in this case."

21 Any comment on that? That's essentially what I  
22 told you I was inclined to say this morning.

23 MR. MCGINTY: May we have a minute, your  
24 Honor?

25 (Pause.)

1 MR. MCGINTY: Fine, your Honor. Thank you.

2 THE COURT: Anything from the government?

3 MS. SEDKY: Nothing further, your Honor.

4 THE COURT: All right. So you'll move the  
5 easel and be back in 10 minutes.

6 (Recess, 2:35 p.m.)

7 (Resumed, 2:50 p.m.)

8 THE COURT: We'll make the current version of  
9 the superseding indictment an exhibit and we'll get the  
10 jury.

11 (Jury enters, 2:50 p.m.)

12 THE COURT: All right. Ladies and gentlemen,  
13 now I am going to give you your instructions. As I  
14 said, I'm going to give them to you in three parts. The  
15 first part would be instructions that would apply in any  
16 criminal case like this one. The second part will be  
17 specific to the wire fraud charges that you'll need to  
18 decide. And the third part will relate to the process  
19 of your deliberations.

20 With regard to the first part, the instructions  
21 that would apply in any criminal case. While the law  
22 permits me to comment on the evidence, I choose not to  
23 do that. As I told you at the beginning of the case,  
24 you should not interpret, or to be more precise,  
25 misinterpret anything that I've said and done in the

1 course of the case or anything that I say to you now as  
2 an indication of what I think your verdict should be.  
3 That's entirely up to you.

4 You must decide whether the government has proven  
5 the defendant guilty beyond a reasonable doubt on each  
6 particular charge. You'll make that decision based on  
7 the evidence and the law as I instruct you. You have to  
8 know the law, and it's my duty to teach you the law.

9 I've discussed what I was going to instruct as my  
10 thoughts have evolved with the lawyers in the course of  
11 the case, but if anything they've said about the law  
12 sounds different to you than what I'm saying now, you  
13 have to follow the law as I'm describing it now. And  
14 similarly, if anything I've said to you in my brief  
15 preliminary instructions at the beginning of the case  
16 sounds different to you than what I'm telling you about  
17 the law now, you must follow the law as I'm describing  
18 it to you today.

19 I've worked to try to develop an accurate,  
20 complete and balanced description of the law. You  
21 should not single out any one instruction or sentence,  
22 but consider each of the things I say to you in the  
23 context of the others.

24 You are required, by the oath that you've taken,  
25 to follow the law whether you understand the reasons for

1     it or agree with it. As I said, you took an oath. If  
2     the government doesn't prove every essential element  
3     beyond a reasonable doubt, you must find the defendant  
4     not guilty on a particular charge. If you find the  
5     government has proven every element of a charge beyond a  
6     reasonable doubt, you must find the defendant guilty on  
7     that charge. And I'm going to explain the elements of  
8     wire fraud to you.

9             You are required to decide whether the defendant  
10    has been proven guilty beyond a reasonable doubt. You  
11    should understand, however, and remember that if the  
12    defendant is convicted, if he's found guilty, the issue  
13    of punishment is solely for the Court, for the judge.  
14    It would be improper for you, the jury, to consider or  
15    be influenced by what the possible punishment might be.

16            You've heard me say repeatedly that you must  
17    decide the case based on the law and the evidence and  
18    that means, among other things, that you must disregard  
19    any possible bias or prejudice or sympathy that you may  
20    have. Both the defendant and the public expect that you  
21    will carefully and impartially consider all the evidence  
22    in this case, follow the law as I describe it, and reach  
23    a just verdict regardless of consequences.

24            As I've told you before, there are certain  
25    fundamental principles that apply in every criminal case

1     like this one. First among them is that the defendant,  
2     Mr. Harris, is presumed innocent. You'll have the  
3     indictment in the jury room. You must remember that  
4     that indictment is only an accusation, it's a way of  
5     informing the defendant of the charges against him and  
6     bringing him to court for this trial. It is not itself  
7     evidence or any proof that he's guilty of any charge.  
8     In order for you to find the defendant guilty of a  
9     charge, the government must prove his guilt on that  
10    charge beyond a reasonable doubt.

11           The defendant has no obligation to prove his  
12    innocence, he has no obligation to present testimony, he  
13    has no obligation to testify himself. Where as here the  
14    defendant has chosen not to testify, you may not  
15    consider that as an indication that he is guilty. You  
16    should not discuss or consider that at all.

17           Now I've said repeatedly that the burden is on the  
18    government to prove beyond a reasonable doubt that the  
19    defendant is guilty of the charge raised against him.  
20    I'm now going to tell you what reasonable doubt means.

21           The burden of proof has nothing to do with who  
22    called the witness or offered documents into evidence,  
23    It has to do with the quality of the evidence. Proof  
24    beyond a reasonable doubt is a strict and heavy burden,  
25    but it does not mean that a defendant's guilt must be

1 proved beyond all possible doubt. It does require that  
2 the evidence exclude any reasonable doubt concerning the  
3 defendant's guilt.

4 A reasonable doubt may arise not only from the  
5 evidence produced, but also from the lack of evidence  
6 produced by the government. Reasonable doubt exists  
7 when after weighing and considering all the evidence,  
8 using reason and common sense, jurors cannot say that  
9 they have a settled conviction of the truth of the  
10 charge.

11 Of course a defendant is never to be convicted on  
12 suspicion or guesswork. If, for example, you view the  
13 evidence in the case as reasonably permitting either of  
14 two conclusions, one that the defendant is guilty as  
15 charged and the other that the defendant is not guilty,  
16 you will find the defendant not guilty. It is not  
17 sufficient for the government to establish a  
18 probability, though a strong one, that an element of the  
19 offense charged or a fact necessary to prove an offense  
20 charged is more likely to be true than not true. That  
21 is not enough to meet the burden of proof beyond a  
22 reasonable doubt. On the other hand, there are very few  
23 things in this world that we know with absolute  
24 certainty and in criminal cases the law does not require  
25 proof that overcomes every possible doubt.

1           So concluding my instructions on the burden then,  
2       I instruct you that what the government must do to meet  
3       its heavy burden is to establish the truth of each part  
4       of each offense charged by proof that convinces you and  
5       leaves you with no reasonable doubt and therefore  
6       satisfies you that you can, consistent with your oath as  
7       jurors, base your verdict upon it. If you find a  
8       particular charge against the defendant has been proven  
9       beyond a reasonable doubt, you will return a verdict of  
10      guilty on that charge. If on the other hand you think  
11      there is a reasonable doubt about whether a defendant is  
12      guilty of a particular offense, you must give the  
13      defendant the benefit of the doubt and find the  
14      defendant not guilty of the offense.

15           Now I have said that you have to decide the facts  
16      based on the evidence. The evidence has come to you in  
17      three forms. As I predicted, in the form of testimony,  
18      in the form of exhibits that have been admitted into  
19      evidence and which you'll have in the jury room, and in  
20      the form of stipulated facts, facts that the parties  
21      agree are true and you may accept as true. As the jury  
22      you're the judges of the facts, you decide if the facts  
23      are proven, you decide what inferences to draw from  
24      those facts, you decide the credibility of the evidence  
25      that's been presented.



1           With regard to all of the evidence, you can  
2       accept -- with regard to each piece of evidence, you can  
3       -- or each witness's testimony, you can accept all of  
4       it, you can disbelieve it and reject all of it, or you  
5       can believe part of it and disbelieve another part of  
6       it. And once you decide what's true, you decide what  
7       weight to give to that evidence.

8           In considering the evidence, you may draw  
9       reasonable inferences from the facts proven. I told you  
10      before that you need to put aside any possible bias,  
11      sympathy or prejudice you may have, but you're not to  
12      put aside your common sense. You're expected to bring  
13      together your common sense and serve somewhat as the  
14      common sense of the community in this case.

15          Facts can be proven by both direct and  
16      circumstantial evidence. Direct evidence is the  
17      testimony of someone who asserts actual knowledge of the  
18      facts, someone who says "I was there, this is what I saw  
19      and this is what I heard." Circumstantial evidence is  
20      proof of events or circumstances on the basis of which  
21      you, based on your common experience, may infer the  
22      existence or nonexistence of a fact.

23          And looking out the window I think it's timely to  
24      remind you of the example I gave you at the beginning of  
25      the case to explain what circumstantial evidence is, and

1 I'll elaborate it a bit. Because remember I told you  
2 that while circumstantial evidence may sound like some  
3 complicated legal concept, it's really something you do,  
4 reasoning by circumstantial evidence, every day.

5 So if you were to go to sleep tonight and the  
6 ground were green in front of your home and you woke up  
7 tomorrow morning and there was 6 inches of snow there,  
8 you would infer that during the night while you were  
9 sleeping it snowed, although you didn't see it and  
10 nobody told you that. And if you looked out into the  
11 snow and saw there were footsteps leading to your front  
12 door, you would infer that during the night, while you  
13 were sleeping, after it snowed, somebody walked to your  
14 front door. And if the newspaper was at the end of the  
15 footsteps, you would infer that during the night, while  
16 you were sleeping, after it snowed, somebody delivered  
17 the newspaper. That's reasoning from circumstantial  
18 evidence.

19 Direct and circumstantial evidence have equal  
20 standing in the law, you decide what weight to give to  
21 each. No greater certainty is required of  
22 circumstantial evidence than of direct evidence. You  
23 should consider all of the evidence and give each item  
24 the weight you think it deserves.

25 Certain things are not evidence. Anything you saw

1 or heard outside the railing there in this courtroom is  
2 not evidence and you should disregard it. If an answer  
3 was given to a question and I later said that it was  
4 inadmissible and directed you to disregard it, you  
5 should disregard the answer. If I allowed any evidence  
6 in for only a limited purpose, you should use it only  
7 for that limited purpose.

8 As I've told you several times, anything the  
9 lawyers say is not evidence. Their opening statements,  
10 their questions, their closing arguments is not evidence  
11 -- are not evidence. And if in these closings that we  
12 just heard the lawyer's memory of the evidence differs  
13 from yours, individually and collectively, then you  
14 should rely on your memory of the evidence rather than  
15 what the lawyers said.

16 In the course of the case, as in every trial there  
17 have been some objections, but actually not that many  
18 while you've been sitting there, and it's proper, as I  
19 told you, for a party to object. It provides me an  
20 opportunity to decide whether the information at issue  
21 is sufficient, relevant -- sufficiently relevant and  
22 reliable to come to your attention under the rules of  
23 evidence.

24 You shouldn't draw any inferences or conclusions  
25 from the objections or my rulings. If I sustain the

1 objection, you should -- if I sustain the objection, you  
2 should disregard any answer that might have been given.  
3 If I overrule the objection, you should treat the answer  
4 like any other answer. And as I said, if I gave any  
5 limiting instruction, you should use the testimony only  
6 for that limited purpose.

7 I told you in my preliminary instructions that  
8 when we got to this point, since you're going to have to  
9 judge the credibility, the believability of some  
10 evidence of the witnesses, I would give you sort of a  
11 common-sense checklist of things that you might want to  
12 think about in judging credibility or believability.

13 You should treat the testimony of a law  
14 enforcement officer like the testimony of anybody else  
15 and not assume that he's more likely or less likely to  
16 be telling the truth because he's employed in law  
17 enforcement.

18 With regard to all the witnesses, you may want to  
19 ask yourself did he or she seem honest? Is what the  
20 witness said reasonable? Did it make sense? Did the  
21 witness have a reason not to tell the truth? Did the  
22 witness have a personal interest in the outcome of the  
23 case? Did the witness have a relationship to either  
24 side of the case? Did the witness have a reason to be  
25 prejudiced against or hostile to any party? Will the

1 witness be affected by the verdict? Did the witness  
2 seem to have a good memory? Did the witness have a good  
3 opportunity to observe what he or she testified to? Did  
4 the witness answer the questions directly or not? Did  
5 the witness's testimony differ from the testimony of  
6 other witnesses? Was that testimony supported or  
7 contradicted by other evidence in the case?

8 Inconsistencies between two witnesses, or several  
9 witnesses, and inconsistencies in two statements by the  
10 same witness may or may not bear on credibility.

11 Sometimes they're just innocent differences in  
12 perception and memory. It's also possible that  
13 somebody's contriving or making up their testimony. So  
14 in judging any inconsistencies you may want to consider  
15 whether the witness had a motive to lie, did the  
16 inconsistency concern an important matter or an  
17 unimportant detail, did it seem to be an innocent error  
18 or an intentional lie?

19 You heard some testimony that witnesses made  
20 statements before trial. You can consider those  
21 statements made before trial in deciding whether to  
22 believe the trial testimony you heard from any witness.  
23 You can decide if the prior statement was inconsistent  
24 with the trial testimony, and if so, decide whether it  
25 affects the believability of the testimony you heard at

1 trial. If the prior statement was under oath, you may  
2 consider it for the truth of the matter discussed  
3 previously under oath and for the credibility of the  
4 trial testimony and any evidence you heard or statements  
5 that the defendant made before the trial you may  
6 consider for the truth of what you find was said.

7 Now, you heard the testimony of some witnesses who  
8 were given immunity by court order or by an agreement  
9 with the government. Those agreements in the court  
10 order provide that no testimony given by the witness  
11 will be used against him or her, directly or indirectly,  
12 except in a prosecution for perjury or if he or she  
13 testifies falsely.

14 You're instructed that the government's entitled  
15 to present the testimony of an immunized witness. Some  
16 people who are given immunity are entirely truthful when  
17 testifying. However, the testimony of such a witness  
18 should be examined by you with greater care than the  
19 testimony of an ordinary witness. You should scrutinize  
20 it closely because such a witness may have a motive to  
21 falsify by making up stories or exaggerating what others  
22 did because he or she wants to avoid getting  
23 prosecuted. As with all the evidence, in deciding  
24 whether some or all of the testimony of a witness with  
25 immunity was truthful, you should consider, among other

1 things, whether it was contradicted or corroborated,  
2 supported, by other evidence in the case. As I said,  
3 you should scrutinize the testimony of an immunized  
4 witness with great care and rely on it with caution. If  
5 after doing so you find some or all of his testimony to  
6 be true, you should give it such weight as you believe  
7 it deserves.

8 You also heard some testimony that some of the  
9 witnesses met before or during the trial with the  
10 government lawyers. It's permissible for the  
11 government, and indeed any lawyer, to discuss testimony  
12 with a prospective witness. However, you can consider  
13 those meetings in evaluating the testimony you heard and  
14 deciding whether the witness was biased or influenced by  
15 discussions with the lawyers.

16 You also heard testimony from some witnesses who  
17 were allowed to give opinions and explain things not  
18 specific to this case, relevant, but not specific to  
19 this case, but based on a particular experience or  
20 expertise that they have. And they were allowed to give  
21 that evidence to help you, the jury, but not to replace  
22 your judgment. So with regard to the people who  
23 testified as experts, you should consider their training  
24 and experience, you should consider the reasons for the  
25 opinions or explanations they gave you and the facts on

1     which the witness relied. If any of the facts on which  
2     the witness relied are not proven, you should disregard  
3     any opinion to the extent it's based on unproven facts.  
4     And with experts, like any witness, you can accept or  
5     reject opinions in whole or in part.

6             So that completes the first part of my  
7     instructions, those that apply in a criminal case. Now  
8     I'm going to give you the instructions that apply to the  
9     particular charges in this case.

10            There are now eight charges of wire fraud for you  
11     to decide. You're not being asked to decide whether the  
12     government has proven Count 1, the conspiracy charge  
13     that was read to you at the beginning of the trial and  
14     that charge has been removed from the indictment with a  
15     superseding indictment that you'll have in the jury  
16     room. Now it's shorter.

17            As I've told you, the indictment is only an  
18     accusation, it's not evidence or proof that a defendant  
19     is guilty of any or all of the wire charges. The  
20     defendant has pled not guilty, therefore the government  
21     must prove he's guilty beyond a reasonable doubt to  
22     achieve his conviction on a particular charge.

23            Each count alleges a separate crime and you should  
24     decide and consider each count separately and return a  
25     separate verdict for each. Unless I gave you a limiting



1 instruction in the course of the trial, you may consider  
2 all of the evidence in deciding each count. And if I  
3 did give you a limiting instruction, you have to follow  
4 it. As to each separate charge you must determine  
5 whether the government has proven the defendant guilty  
6 beyond a reasonable doubt.

7 Evidence provided by or concerning other people  
8 may be considered by you. However, the fact that  
9 another person pled guilty to committing some other  
10 crime himself is not evidence or proof that Mr. Harris  
11 is guilty of any of the wire fraud charges in this  
12 case. Your verdict should be based solely on the  
13 evidence or lack of evidence concerning Mr. Harris, and  
14 in accordance with my instructions, and without regard  
15 to the guilty pleas of others. So that means you can  
16 consider the testimony of others, but the fact, as I  
17 said, that some of the witnesses pled guilty to  
18 something, is not itself, the guilty pleas themselves  
19 are not evidence that Mr. Harris is guilty of the  
20 charges in this case.

21 Depending on your view of the evidence, you may  
22 find Mr. Harris not guilty on all eight charges, you may  
23 find him guilty on some of the charges and not on other  
24 charges, or you may find him guilty on all of the  
25 charges. That depends on your view of the evidence.

1           You'll see the indictment charges that certain  
2       alleged crimes were committed on or about certain  
3       dates. Although it's not necessary for the government  
4       to prove beyond a reasonable doubt that the crimes were  
5       committed on a particular day, it does have to prove  
6       that the crime was committed at a time reasonably near  
7       the dates alleged in the indictment.

8           Now, as I've said, each of the remaining counts  
9       charges Mr. Harris with committing wire fraud. And so  
10      the charging language begins in Paragraph 2, which is on  
11      the first page of the indictment you'll have in the jury  
12      room, and it says: "On or about the dates set forth  
13      below, in the District of Massachusetts and elsewhere,  
14      Ryan Harris, having knowingly devised a scheme to  
15      defraud and to obtain money and property by means of  
16      false" -- I'm sorry, "by means of material false and  
17      fraudulent pretenses, representations and promises,  
18      transmitted and caused to be transmitted in interstate  
19      commerce wire communications, including writings,  
20      signals and sounds, for the purpose of executing the  
21      scheme to defraud and aided and abetted others in doing  
22      so as set forth below."

23           So then Count 1 charges that in approximately  
24      2005, Nathan Harris accessed the Internet from  
25      Massachusetts and downloaded Harris's Sigma cable modem

1     hacking product. Essentially it's alleged that was in  
2     furtherance of the alleged scheme to defraud.

3             Count 2 charges that in about 2007 Hanshaw --  
4     another wire fraud was committed for which Mr. Harris is  
5     allegedly responsible because Hanshaw, it's charged,  
6     accessed the Internet from Massachusetts and downloaded  
7     Harris's Sigma X cable modem hacking product.

8             Count 3 charges that on or about January 15th,  
9     2007, in furtherance of the scheme Hanshaw accessed the  
10    Internet from Massachusetts using Harris's products and  
11    a cloned MAC address and participated in an on-line chat  
12    discussing his hacking activities.

13            Count 4 charges that on December 5, 2007, or about  
14    December 5th, 2007, Hanshaw accessed the Internet from  
15    Massachusetts using Harris's products and cloned a MAC  
16    address and participated in an on-line chat discussing  
17    his hacking activities.

18            Count 5 charges that on or about June of 2008,  
19    Mr. Larosa, Jose Larosa, accessed Harris's TCNISO  
20    website from Massachusetts and bought a modified cable  
21    modem and ancillary products in furtherance of the  
22    scheme.

23            Count 6 charges that on or about July of 2008,  
24    Larosa accessed the Internet from Massachusetts using  
25    Harris's products and a cloned MAC address and obtained

1 free Internet access.

2 Count 7 charges that William Madeira accessed, on  
3 about June of 2009, Harris's TCNISO website from  
4 Massachusetts and bought a modified cable modem and  
5 ancillary products.

6 And Count 8 charges that in furtherance of the  
7 scheme, about July of 2009, Madeira accessed the  
8 Internet from Massachusetts using Harris's products and  
9 a cloned MAC address and obtained free Internet access.

10 For present purposes you don't have to try to  
11 memorize all of that. You're going to have it in the  
12 jury room with you.

13 So all of the charges are charges of wire fraud.  
14 Now I'm going to tell you what the government has to  
15 prove, beyond a reasonable doubt, to prove a wire fraud  
16 charge.

17 To prove -- and I'm going to read this to you and  
18 part of the reason I'm going to read it to you is you  
19 may come back and ask me to tell you again and it's  
20 important that I be able to tell you the same thing, if  
21 you do that, so. It's not all that long. But anyway.

22 To prove that the defendant committed a wire fraud  
23 charge in this case the government must prove the  
24 following things beyond a reasonable doubt. First,  
25 there was a scheme substantially as charged in the

1 indictment to defraud or obtain something of value from  
2 internet service providers by means of false or  
3 fraudulent pretenses. Second, that the defendant  
4 knowingly and willfully participated in the scheme with  
5 an intent to defraud. And third, on or about the dates  
6 alleged, the defendant transmitted or caused to be  
7 transmitted an interstate wire communication for the  
8 purpose of furthering the scheme.

9 If the government fails to prove any of these  
10 elements beyond a reasonable doubt, you must find the  
11 defendant not guilty on the count you are considering.  
12 If the government proves all of these elements beyond a  
13 reasonable doubt with regard to a particular count, you  
14 must find the defendant guilty of that charge.

15 As I said, the first thing that the government  
16 must prove beyond a reasonable doubt is that the  
17 defendant participated in a scheme to defraud that  
18 involved material false or fraudulent pretenses. A  
19 scheme is a plan or a course of conduct. The term  
20 "defraud" means to deprive somebody of something of  
21 value by means of deception or cheating. A scheme to  
22 defraud ordinarily includes a desire to bring about some  
23 gain or benefit for oneself or some other person or a  
24 desire to cause some loss to somebody else. The term  
25 "false or fraudulent pretenses" means any intentional

1 material false representation or omission, including  
2 material direct false representations and the deliberate  
3 concealment of material facts. A fact is material if it  
4 has a natural tendency to influence or is capable of  
5 influencing whoever or whatever is making a particular  
6 decision.

7 In essence, in this case the government must,  
8 among other things, prove beyond a reasonable doubt the  
9 existence of a scheme to deprive internet service  
10 providers of payment for internet service based on  
11 intentional material false representations or omissions  
12 relating to a particular device concerning whether that  
13 device was authorized to receive such service. While  
14 the government must prove that the scheme alleged in the  
15 indictment existed, it does not have to prove that it  
16 succeeded.

17 The next thing that the government must prove  
18 beyond a reasonable doubt is that the defendant  
19 participated in the alleged scheme knowingly and  
20 willfully and with intent to defraud. The government  
21 does not have to prove that the defendant originated the  
22 alleged scheme, it only has to prove that he  
23 participated in it with the required knowledge and  
24 intent to defraud. To act knowingly means to act  
25 intentionally and not by accident or mistake. To act

1 willfully means to intentionally do something known to  
2 be unlawful. An intent to defraud means to act  
3 knowingly and with specific intent to deceive and for  
4 the purpose of causing some financial loss or to obtain  
5 money for the defendant or someone else or for both of  
6 these purposes.

7 It would not be enough to prove wire fraud for the  
8 government to prove only that Harris sold one or more  
9 products that he knew would be used to commit a crime.  
10 However, the nature of any product sold and any  
11 knowledge that Harris had as to how it would be used are  
12 evidence that you can consider, along with all the other  
13 evidence, in deciding whether the government has proven  
14 any or all of the wire fraud charges in this case.

15 Now, it may be hard to get into somebody's head,  
16 so intent or knowledge need not be proven by direct  
17 evidence. Rather circumstantial evidence, as well as  
18 direct evidence, may be important in determining the  
19 defendant's state of mind. In determining what the  
20 defendant knew or intended at a particular time you may  
21 consider any statements made or anything done or not  
22 done by the defendant and all the other facts and  
23 circumstances proven by the evidence.

24 You may infer, but you certainly are not required  
25 to infer, that a person intends the natural and probable

1 consequences of acts knowingly done or deliberately not  
2 done. It's entirely up to you, however, to decide what  
3 facts were proven by the direct and circumstantial  
4 evidence.

5 The last thing that the government must prove  
6 beyond a reasonable doubt is that on or about the date  
7 alleged in the indictment, for the count you are  
8 considering, the defendant transmitted or caused to be  
9 transmitted an interstate wire communication in  
10 furtherance of the alleged scheme. The use of the  
11 internet to send a message, such as an e-mail or a  
12 communication to a website, may be a wire  
13 communication.

14 An interstate wire communication is a wire  
15 communication from one state to another. The wire  
16 communication does not have to be essential to the  
17 scheme or itself be fraudulent. However, it must be  
18 made as part of an attempt to execute the scheme or  
19 accomplish one of its goals. To prove that the  
20 defendant caused a particular interstate wire  
21 communication to occur, the government does not have to  
22 prove that he sent the wire communication himself. It  
23 would be sufficient if the government proved beyond a  
24 reasonable doubt that he knew that the use of interstate  
25 wires would follow in the course of the scheme or that



1     it was reasonably foreseeable that the interstate wires  
2     would be used as a result of his actions. It is the use  
3     of the interstate wires generally rather than the  
4     specific wire transmission that is charged that must be  
5     proved to have been reasonably foreseeable as a result  
6     of the scheme.

7             Therefore, if it is proven that Harris  
8     participated in the alleged scheme and did something  
9     relating to it which he knew or should have reasonably  
10    foreseen would result in interstate wire transmissions  
11    being used in an effort to execute the scheme or  
12    accomplish one of its goals, you may find the use of the  
13    interstate wire communication element to be proved.

14            As I said earlier, if you find that the government  
15    has proven beyond a reasonable doubt every essential  
16    element of wire fraud concerning the particular count  
17    you're considering, you shall find the defendant guilty  
18    on that count. If the government has failed to meet  
19    that burden, you shall find the defendant not guilty on  
20    that count. As I also said earlier, depending on your  
21    view of the evidence, you may find the defendant not  
22    guilty on all counts, guilty on some but not all counts,  
23    or guilty on all counts.

24            Now I'm going to move to the third part of these  
25    instructions which relate to your deliberations.

1           When we finish -- when I finish these  
2       instructions, relatively soon, you'll go back to the  
3       jury room, and I hope they'll be enough time for this,  
4       but the first thing you should do is choose a  
5       foreperson, somebody to moderate your discussions and  
6       communicate with me on your behalf.

7           Then, either today or tomorrow, we're going to be  
8       guided by your preferences from now on, um, you should  
9       engage in rational discussion by all jurors for the  
10      purpose of reaching a unanimous verdict. Every juror  
11      should decide the case for himself or herself in the  
12      context of the evidence and the law giving proper  
13      consideration to the views of your fellow jurors. You  
14      should reconsider your initial views and change them if  
15      you're persuaded that they're not right, but you  
16      shouldn't abandon your views solely for the sake of  
17      reaching a unanimous verdict.

18           You should discuss the case only when you're all  
19      together so everybody gets the benefit of everybody  
20      else's view. And your verdict must be unanimous on each  
21      count. You're going to have a very simple verdict form  
22      that says: "We the jury find the defendant, Ryan  
23      Harris, blank on Count 1, blank on Count 2." And when  
24      all twelve of you agree, the foreperson will write what  
25      you agree, guilty or not guilty on Count 1, for each of

1 the eight counts.

2 If you need to communicate with me, the foreperson  
3 should write a question or a communication and sign it,  
4 but at no time, until you have a unanimous verdict,  
5 should you send me any note that indicates what you've  
6 already decided or how you're divided on anything.  
7 We're not entitled to know that until you've reached  
8 unanimous verdicts on all counts.

9 All right. May I see counsel at sidebar, please.

10

11 AT THE SIDEBAR

12 THE COURT: Are there any objections to the  
13 instructions?

14 MR. BOOKBINDER: Not from the government.

15 MR. MCGINTY: Your Honor, with respect to the  
16 Court had given an instruction regarding cooperating  
17 witnesses, but hadn't mentioned -- I'm sorry, immunized  
18 witnesses, but hadn't mentioned cooperating witnesses  
19 that are testifying subject to a plea agreement.

20 THE COURT: But I think they were covered in  
21 the sense that I said some had -- one had an order or  
22 the other had -- I think I said plea agreements, but  
23 agreements with the government. I think it's covered.  
24 It's the same people, if I didn't say it.

25 MR. BOOKBINDER: The agreement gives them

1 immunity in any case.

2 THE COURT: Yeah, I did refer to the  
3 agreement.

4 MR. MCGINTY: Thank you, Judge. I think  
5 that's it.

6 THE COURT: All right. Thank you.

7

8 (In open court.)

9 THE COURT: All right.

10 Ladies and gentlemen, that completes my  
11 instructions. It's 3:30. Um, I want you to go back to  
12 the jury room and I'm afraid I have to separate our  
13 alternates. At this time of year I usually lose  
14 somebody in the course of a week-long trial, but only  
15 twelve of you can deliberate and decide the case. So I  
16 want you to stay here and I expect come back tomorrow as  
17 well because sometimes, even in the course of  
18 deliberations, a juror -- that something happens to a  
19 juror and occasionally the remedy for that is to start  
20 again in the deliberations. So I apologize, but that's  
21 the way it has to work.

22 In any event, I'm going to excuse you. Twelve of  
23 you will be back there. I hope you can pick a  
24 foreperson and then let me know what you want to do.  
25 It's snowing and you probably -- well, you can start

1     deliberating and, you know, you can tell me at about  
2     4:15 that you want to go home and come back tomorrow  
3     morning or that you want to keep deliberating. We'll be  
4     guided by your preference.

5             If you look out the window and say, "We don't even  
6     want to wait until 4:15, we'd rather just get into this  
7     tomorrow," then I'll let you go home early. Let me know  
8     what you want to do. Write a note. But if I haven't  
9     heard from you beforehand, please send me something at  
10    4:15, so I have a sense of direction for us. In fact,  
11    if you want to work into the night, we'll get you some  
12    pizza or something. But I'm not ordering you to do  
13    that.

14            So when you get back there, first you're going to  
15    get the exhibits in paper form and then -- you've seen  
16    that big flat screen there. There's a way for you to  
17    look at the exhibits on a disk. You're going to be the  
18    first of my jurors to use that technology. I assume it  
19    works, but I haven't tried it out. But we need to make  
20    sure that you've got everything that you're supposed to  
21    have on the disk and nothing else. So maybe -- I'm not  
22    sure where we are on that. It may be that you have to  
23    start the old fashioned way. But we'll get you there,  
24    too. Um, and you'll get your notebooks back. You'll  
25    have those in the jury room. And we'll get you whatever

1       else you need.

2               All right. Is there anything before we excuse the  
3 jury?

4               MR. BOOKBINDER: Not from the government, your  
5 Honor.

6               MR. MCGINTY: No, your Honor. Thank you.

7               THE COURT: All right. The Court will be in  
8 recess for the jury.

9               (Jury leaves to deliberate, 3:30 p.m.)

10              THE COURT: All right. What is the status of  
11 the --

12              (Pause.)

13              THE COURT: What is the status of the  
14 exhibits?

15              MR. BOOKBINDER: We're just consulting right  
16 now, your Honor.

17              THE COURT: All right. Well, you want to work  
18 with Mr. Hohler, I would say, first on the paper  
19 exhibits and then on the disk, and don't go very far  
20 away. I won't be surprised if they pick a foreperson  
21 and say they want to go home right now.

22              MR. MCGINTY: Although that pizza invitation  
23 kind of caught their eye.

24              THE COURT: You think? I thought that was  
25 reinforcing a desire to get out of here.

1 (Laughter.)

2 THE COURT: Anyway. The Court is in recess.

3 (Recess, 3:35 p.m.)

4 (Resumed, 3:45, juror note.)

5 THE COURT: The pizza was not that enticing.

6 I'll have you know it says: "It's been decided that

7 Juror Number 7 will be the foreperson for this case.

8 The jury would like to adjourn for the day and come back

9 on Thursday, March 1, at 9:00 a.m. So I will have them

10 in and excuse them.

11 Did we lose Ms. Sedky?

12 MR. BOOKBINDER: We did, your Honor. She had

13 family responsibilities. She had to get back to

14 Washington.

15 THE COURT: Okay. So we can mark this as

16 Juror Question 1.

17 All right. We'll bring the jury in.

18 MR. MCGINTY: Your Honor, is that Seat 7 or

19 Number 7?

20 THE COURT: Seat 7.

21 MR. MCGINTY: Seat 7. And that would be in

22 the front row?

23 THE COURT: Well, you'll see in a minute. I

24 just thought I would, at this point, put the name on the

25 record.

1 (Jury enters, 3:50 p.m.)

2 THE COURT: Just everybody move down one.

3 (Move seats over.)

4 THE COURT: All right.

5 Mr. Foreperson, I have a note that says: "It's  
6 been decided that Juror Number 7 will be the foreperson  
7 for this case. The jury would like to adjourn for the  
8 day and come back on Thursday, March 1, at 9:00 a.m."

9 Have I read that right?

10 THE FOREPERSON: Yes, your Honor.

11 THE COURT: And then, as I said, we'll honor  
12 that request.

13 It's only snowing lightly here now. Hopefully it  
14 won't get much worse. But if the Boston schools are  
15 closed or delayed tomorrow morning, then you don't need  
16 to come in. If the Boston schools are open, um, you do  
17 need to come in. Although if the weather makes it  
18 difficult or dangerous to get here by 9:00, just take  
19 your time. But hopefully now that we're at this  
20 important stage, we'll be able to go ahead tomorrow.

21 You are now at a time when you can discuss the  
22 case among yourself, of course, but wait until all  
23 twelve of you are there to do that to make sure that  
24 everybody gets the benefit of everybody else's  
25 thoughts.



1           It's especially important that you not read,  
2       listen or watch anything about the case that may be in  
3       the media. Everything that's relevant and everything  
4       you're entitled to consider has been presented here in  
5       court. Of course, don't discuss the case with anybody  
6       who is not on the jury.

7           You'll come back tomorrow. When you get here at  
8       9:00, I'll have you in the courtroom briefly just so I  
9       can be sure you're all here, and you'll go back and  
10      you'll deliberate. I think they'll bring you some  
11      snacks mid-morning and if you're still deliberating,  
12      they'll give you lunch.

13          I have no idea how long your deliberations should  
14      take, and these comments should not be interpreted as a  
15      suggestion of how long I think they should take, but if  
16      you're still deliberating tomorrow afternoon, I'll ask  
17      you to, you know, let me know at 4:00 whether you want  
18      to keep going or whether you want to go home and come  
19      back on Friday. All right?

20          So there have been times, particularly recently,  
21      particularly today, that you've had to wait for us, now  
22      we're going to wait for you.

23          Okay. The Court is in recess for the jury.

24                 (Jury leaves, 4:00 p.m.)

25                 THE COURT: All right. I'll see you all at

1 9:00 tomorrow morning.

2 The Court is in recess.

3 (Adjourned, 4:00 p.m.)

4  
5 C E R T I F I C A T E

6  
7 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do  
8 hereby certify that the forgoing transcript of the  
9 record is a true and accurate transcription of my  
10 stenographic notes, before Chief Judge Mark L. Wolf, on  
11 Wednesday, February 29, 2012, to the best of my skill  
12 and ability.

13  
14  
15 /s/ Richard H. Romanow 11-07-12

16 \_\_\_\_\_  
RICHARD H. ROMANOW Date